90893-1



**No. 439409**
**SUPREME COURT**
**OF THE STATE OF WASHINGTON**

**C. P. B. & L. TRUST**

Appellant,

vs.

**PORT OF TACOMA**

Respondent.

# MOTION FOR DISCRETIONARY REVIEW

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## A. IDEN TITY OF PETITIONER

C.P.B. & L. Trust asks this court to accept review of the decision or parts of the decision designated in Part B of this motion.

## B. DECISION

The Unpublished Opinion entered July 8, 2014, affirming the trial courts's grant of summary judgment and attorney fees to the Port of Tacoma, and Order Denying Motion to Publish, Denying Motion to Reconsider and Granting Respondent's Attorney Fees entered September 2, 2014. A copy these decision is in the Appendix at pages A-1 to A 24 and denial of motions to reconsider and publishing at page A - 25. Review is requested of all with any subsequent orders on attorney fees.

## C. ISSUES PRESENTED FOR REVIEW

**1. Supreme Court Conflict**: Decisions of the Court of Appeals is in conflict with decisions of the Supreme Court. Escrow Agreement - Guaranty Agreement: *Wilson Court, Ltd., Partnership v. Toni Maroni's, Inc.*, 134 Wn.2d 692, 952 P.2d 540 (1998), *Hansen Service v. Lunn,* 155 Wash. 42, 283 P.695 (1930). Contract language: *Cambridge Townhome, LLC v. Pacific Star Roofing, Inc.* 166 Wn2d 475, 209vp.3D 863 (2009). Ambiguities interpreted against drafter: *Dirk v. Amerco Marketing Co. of Spokane*, 88 Wn.2d 607, 565 P.2d 90 (1977); *Gaylord v. Tacoma School Dist. Nol 10*, 88 Wn.2d 286, 559 P.2d 1340, *certiorari denied* 434 U.S. 879, 98 S.Ct. 234, 54 L.Ed.2d 160 (1977); *Amick v. Baugh*, 66 Wn.@d 298, 402 P.2d 342 (1965). Equitable estoppel, *Sounders v. Lloyd's of London*, 113 Wn.2d 330, 779 P.2d 249 (1989); Spoilation excluding evidence, *Pier 67, Inc. V. King County*, 89 Wn.2d 379, 573 P.2d 2 (1977); Summary Judgment, *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d. 1039. CR 56©.

**2. Appeals Court Conflicts**: The decision of the Court of Appeals is in conflict with

decisions of other Court of Appeals. Time is of Essence: *Mid-Town Ltd. Partnership v. Preston*, 69 Wn.App 227, 848 P.2d 1268, *reconsideration denied, review denied*, 122 Wn.2d 1006, 859 P.2d 1006 (Div. 1 1993); *Vacova Co. v. Farrell*, 62 Wn.App. 386, 814 P.2d 255 (Div. 1, 1991). Escrow Agreement - Guarantee: *Old National Bank of Washington v. Seattle Smashers Corp*, 36 Wn.App. 688, 676 P.2d 1034 (1984 Div. 1). Terms to be strictly construed: *Seattle First National Bank v. Hawk*, 17 Wn.App. 251, 562 P.2d 260 (1977 Div. 3). Expiation of contract: . *Thayer v. Damiano*, 9 Wn.App. 207, 511 P.2d 84 (Div. 3, 1973). Equitable Estoppel: *Peckman v. Milroy*, 104 Wn.App. 887, 17 P,3d 1256 (Div. 3 2001) as amended 144 Wn. 2d 1010, 31 P.3d 1184.

**3. Equal Protection Issues**: The decision appears to raise a question under both the Washington State Constitution Privileges and Immunities clause and the 14 Amendment of the Federal Constitution equal protection of the laws by unequal treatment of litigants: *Tunstal ex rel Tunstal v. Bergeson*, 141 Wn.2d 201, 5 P.3d 691, cert. Den. 532 U.S. 920, 121 S.Ct. 1356, 149 L.Ed. 286 (2000); *Petition of Runyan,* 121 Wn.2d 432, 853 P.2d 424 reconsideration denied (1993); *Stone v. Chelan County Sheriff's Dept.* 110 Wn.2d 806, 756 P.2d 736 (1988); *Alton v. Philips Co. V. State*, 65 Wn. 2d 19, 202, 396 P.2d 537 (1964); *State ex rel Bacish v. Huse*, 187 Wash. 75, 59 P.2d 1101 (1936); *Shanks v. Oregon-Washington R. & Nav. Co.*, 98 Wash. 509, 167 P. 1074 (1917).

**4. Substantial Public Interest**: The Decision of the Court of Appeals raises an issue of substantial public interest that should be decided by the Supreme Court: Whether a creditor beneficiary under a deed of trust may be held liable for any Environmental or MTCA claims by reason of being such a beneficiary. Allowing the decision of the Court of Appeals to stand threatens all future real estate secured lending in the state.

**5. Substantial Justice Was Denied** See record and brief as a whole.

## D. STATEMENT OF THE CASE

This dispute arose over rights to an escrow account. It was one of two escrow accounts, each for $500,000.00, posed by secured creditors out of proceeds received from a sale of property, to cover remediation of certain hazardous wastes that may have escaped knowledge or correction prior to the sale of property closing on May 26, 2006, to the Port of Tacoma by Marine View interests and were not created subsequent to that sale. The amount subsequently in question was $490,000.00 as the Port had settled with the other secured creditor for $10,000.00 and the million dollar pledged funds were for only a total of $500,000.00 for any covered remediation costs.

The C.P.B. & L Trust was formed as a spendthrift trust in the winding up of the Camille M. Fjetland guardianship Pierce Court Superior Court Cause No. 93-4-00307-5 to collect the balance owing of a sale price of property from Camille M. Fjetland and the B & L Trucking and Construction Company To 1621 Marine view Drive, Inc (subsequently Marine View, Inc.) that closed on January 25, 1996 and to hold the security interest in the property sold to the Marine View, Inc., interests. (CP 8, 7-49) The Trust never owned any interest in the property, other than a security interest, never operated any business or physical operations on said property nor assumed any obligations for prior owners or operators of said property and does not appear in the chain of title to said property except as a security holder. This is clear from the Port's own evidence, the title report as exhibited in the Declaration of Liberty Waters of January 23, 2012, Exhibit 4 as well as other uncontroverted evidence herein. (CP 179-350)

After considerable cleanup for almost a year prior to closing of the sale, pursuant to agreements between the Port of Tacoma and the Marine View companies (Ex. 1 CP 179-350), a sale of the Marine View Property along with adjacent property formerly belonging to the Foran interests

(Marine View North) was closed on May 26, 2006. This was over ten years after the original sale from Fjetland to Marine View. That Port of Tacoma Purchase and Sale Agreement provided that part of the Purchase price, $500,000 from the Trust and $500,000 from the Foran interests, the designated Seller's Creditors, or a similar amount from the proceeds due Marine View and Marine View North, could be held in escrow subject to a later possible claim by the Port not to exceed $500,000 in the aggregated, for certain work: That Purchase and Sale agreement (to which the Trust was not a party), after clearly describing that Trust and Richard C. Foran as "Seller Creditors" provided specifically §3(c)(2) that (Ex. 1 CP 179-350):

> "If within five (5) years of the Closing Date, Buyer discovers any construction debris or other material on the Marine View Property or the Marine View North Property which was not deposited pursuant to a valid permit, or any hazardous substances (as defined by any federal, state or local law) on the Marine View Inc., property or the Marine View North property which were not deposited on such property after Closing, then Buyer shall give notice to Seller and Seller Creditors of such discovery, which notice shall include a detailed estimate prepared by a qualified independent contractor qualified to contract with the Port of the costs to Buyer to remove such debris or other material or remediate such hazardous substances. Where practical, Buyer shall attempt to obtain a fixed bid for such removal, remediation or resolution."

This provision of the purchase and sale agreement was ignored and never complied with as admitted in the declaration of Leslee Conner, Project manager for Port remediation dated June 15, 2012 (CP 867, 860-922, A-38 et seq.). The Port ignored this clear requirement despite having almost a year prior notice of existence of the substances it wanted to remediate (from 2009 to 2010) (CP 860-922).

While the Trust was not a party to the Purchase and Sale Agreement, it was an obvious third party beneficiary of said contract. The Port further limited is rights to make claims under its Environmental Indemnity Agreement as set forth in §5© where the Port agreed:

> Buyer agrees to look solely to the Special Escrow under Section 3© of this Agreement for satisfaction of indemnity claims under this Section 5©. In addition, Seller's obligations under Section 5© are limited to claims as to which Buyer has given written notice to Seller within five (5) years of closing.

On May 23, 2011, three days before the escrow funds were to be paid to the Trust and the Forans, the Port sent a letter addressed to the Foran interests making claim against that escrow. While the Port mentioned many things in its letter of May 23, 2011, it only made claim for metal contaminations to the seller within five years of closing.

The Trust was not a party to the Purchase and Sale Agreement but a beneficiary of Section §3(c)(2). The Trust was a party to a separate special escrow agreement which provided holding $500,000 of the funds it was entitled to in satisfaction of the Marine View Debt to it. Under that agreement those funds were clearly recognized as belonging to the Trust. The language of the Escrow Agreement on this point is very clear, Paragraph 10 (Ex. 2 CP 179-350):

> **Funds in Escrow**. Except as provided in Sections 3 and 4 above, the Escrow Funds shall be the property of the Trust. Accordingly, the Trust (and not the Escrow Agent) shall be obligated to pay any income taxes on the income of the funds held in Escrow. The Escrow Agent shall be obligated to issue or cause to be issued to the Trust all Forms 1099 and other forms reporting taxable income of the Escrow.

At most, all the Port had was a contingent claim of up to $500,000.00 against the million dollars in funds belonging to Foran and the Trust. To make any claim, it had to not only meet section 3 of the Purchase and Sale Agreement but the added provisions of the Escrow Agreement. Those added provisions were as follows, Section 4 (Ex. 1 CP 179-350):

> If within five (5) years of the "Closing Date" under the Purchase Agreement, the Port discovers any construction debris or other material on the Property which was not deposited pursuant to a valid permit, or discovers any hazardous substances (as defined by any federal, state or local law) on the Property which was not deposited or released onto the Property after the Closing Date, and such materials or condition are not within the scope of the Negotiated Cleanup Obligations, the Port shall give notice to Marine View Inc. and the Trust

(with a copy to Escrow Agent) of such discovery on the Property, which notice shall include a detailed estimate prepared by a qualified independent contractor qualified to contract with the Port of the cost to the Port to remove such debris or other material or remediate such hazardous substances. Where practical, the Port shall attempt to obtain a fixed bid for such removal, remediation or resolution. After the Port furnishes the Trust and Marine View Inc., with notice of such discovery, Marine View, Inc. and the Trust shall each have a reasonable period of not less than 21 days with respect to hazardous substances, and 5 days with respect to debris or materials which are not hazardous substances, after receipt of notice from the Port (such 21- or 5- day periods to run concurrently) to comment upon the proposed remediation before work on said remediation shall commence, except in case of emergency threatening life or limb of persons on the Property or immediate destruction of the Property. (Emphasis added)

The fact that this prior notice was never given is admitted by the Port in the declaration of its manager, Leslee Conner (CP 867, 860-922). Was it overlooked because of an emergency? No. Was it overlooked because of some action taken by the Trust? No. Was it even overlooked because, as the Port's counsel has argued, it really was not necessary? No. Leslie Conner has given the only evidence of why the Port failed to give the Trust the notice (page 7 her declaration of June 15, 2012, paragraph 14):

> Port Failed to Provide Remediation 21-day Notice to Trust. The Trust has correctly asserted that the Port failed to provide the Trust with 21-day prior notice of the remediation, which would have allowed the Trust an opportunity to comment on the planned remediation. That failure was the result of an unintentional human error. For unknown reasons, the Port's files did not contain a copy of the Trusts's Escrow Agreement, which is the only place the 21day notice is identified. The omission was compounded by prior departures of Port staff that had managed the purchase of the property.

The five year period in which the claim had to be served on the Trust ended at midnight, May 25, 2011, because the Escrow agreement clearly stated that if no claim had been made by then, the Trust was to be paid on May 26, 2011. Chicago Title Insurance Company was directed to pay the Trust $500,000.00 by the express terms of Trust's escrow agreement on "the fifth anniversary of the Closing Date..." of that agreement (Escrow Agreement ¶ 7 emphasis added) if no claim had been

filed within the preceding five years. May 26, 2011, was that fifth anniversary and the Port did not serve the Trust with any claim or notice of claim or any other document until May 26, 2011. Tell your spouse if you were married on May 26 and you did not get her a present until later that "Mr. Webster said the anniversary date was May 27" as the Court of Appeals does (A -15), and see how far that will gets you out of the dog house.

After providing all of these notice requirement to perfect any claims against the Sellers and the Seller's Creditors, The Buyer Port, in the Purchase and Sale agreement gave this rather complete release of the Trust and All other interest parties §5(d):

> (d) **Release of Sellers and Seller Creditors.** Buyer and its subsidiaries, officers, directors, managers, members, agents, affiliates, and their successors and assigns, each agree that Sellers, their members, shareholders, managers, employees, agents, contractors and their successors and assigns, and the Seller Creditors, and their trustees, officers, shareholders, employees, agents, contractors and their successors and assigns (collectively, the .."Seller Released Parties"), are hereby released from any and all actions, suits, liabilities, damages, losses, costs, and claims which Buyer may now have or may hereafter have against the Seller Released Parties by reason of any matter relating to or arising from Sellers' or the Seller Creditors' ownership, operation or *use* of the Property; or the physical or environmental condition of the property; provided, however, that the foregoing release shall not. extend to, or provide a release from, any representations, warranties, covenants: indemnifications made by Sellers in this Agreement or in the documents to be delivered at Closing; and provided farther, that the foregoing release shall not limit or impair claims against the Special Escrow pursuant to Sections 3© and/or 5© of this Agreement. Buyer hereby agrees and acknowledges that factual matters now unknown to it may have given or may hereafter give rise to actions, suits, liabilities, damages, losses, costs, or claims, which are presently unknown unanticipated and unsuspected, and Buyer further agrees, represents and warrants that this Agreement has been negotiated and agreed upon in light of such acknowledgment and that, except *as* otherwise expressly provided in the preceding sentence, Buyer nevertheless hereby agrees to release the Seller Released Parties as provided in this Section 5(d).

## E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

**Conditions Not Met Precedent To Port's Claims**

The Appeal Court found only one condition precedent to the Port making a claim (21 day notice) and found that it was not material (IX. Timeliness of Port's Claim). This ignores the undisputed facts that the Trust was entitled to other precedent conditions from the Port before making a claim: 21 days notice (Escrow Agreement §4 - ER 2 A-34); Upon discovery of material needing remediation a "notice shall include a detailed estimate prepared by a qualified independent contractor qualified to contract with the Port of the costs to Buyer to remove such debris or other material or remediate such hazardous substances. Where practical, Buyer shall attempt to obtain a fixed bid for such removal, remediation or resolution." (Purchases and Sale Agreement [PSA] §3 (c)2 - ER 1 A-31). So the Trust was entitled to a detailed report from a qualified independent contractor and the costs along with a fixed bid where practical after the discovery of material needing to be removed.

The Port probably received actual information from the Washington State Department of Ecology as early as 2006 that it was investigative the site for hazardous substances, received an "an Early Notice Letter to the Port. in August 2007." and "A Site Hazard Assessment was completed for Ecology by the Tacoma-Pierce County Health Department in July 2008; the resulting site ranking was 3." (Conner, ER 5 A-38). Asarco slag was 'discovered' in 2009 (Dagel Declaration CP 928-929, 923-942); Petroleum samples were taken in July, August and October, 2010 (Dagel Declaration supra ER 7). Petroleum deports were 'discovered' in July and November 2009 (Hart Crowser report Jule 27, 2011, exhibit Conner's Declaration January 23, 2011 A-35) and were 'remediated' "between August 14, 2010 and August 20, 2010 and at the southeast overexcavation area between October 2,

2010 and October 11, 2010." (Hart Crowser supra.)

The Port contends, through its witness Leslee Conner, that it failed to give the timely notice upon discovery of the needs for remediation and before action was taken because of negligence on the ports part in misplacing the Escrow Agreement. (Appendix ER 5 A-38: Leslee Conner Declaration of June 15, 2012, page 7 ¶ 14). However she was not there for the full five years and does not know why those earlier chose to ignore that agreement, or why she chose to ignore the PSA agreement requirements. The failure certainly supports the presumptions that the Port considered it did not have any claims that were worth pursuing, at least until it got a new greedy staff that was unaware of all the backgrounds..

Notice specifically limited to the metals contamination (Asarco Slag) was first given to the Trust on May 26, 2011 and about the petroleum was given on July These might have been considered sufficient under the Escrow and PSA requirements but they were given at least eight months after the work was completed and several years after supposed discovery.

Under the theory that the Escrow Agreement was a guarantee, the failure to meet these preconditions completely destroys the claims. The Escrow Agreement is specific in its nature and must be strictly construed according to its terms, *Wilson Court, Ltd., Partnership v. Toni Maroni's, Inc.*, 134 Wn.2d 692, 952 P.2d 540 (1998), *Hansen Service v. Lunn,* 155 Wash. 42, 283 P.695 (1930). C.P.B. & L. Trust has the right not to have its guarantee enlarged, *Old National Bank of Washington v. Seattle Smashers Corp*, 36 Wn.App. 688, 676 P.2d 1034 (1984 Div. 1). Where the guarantee is conditional, the guarantor's obligation may not be enforced unless the conditional event has occurred or conditional act has been performed. *Bellevue Square Managers v. Granbery*, 2 Wn.App. 760, 469 P.2d 969, review denied 78 Wn.2d 994 (1970).

Under straight contract law the conditions precedent were required to be met before the remediation was performed. Even if the Escrow Agreement were not considered a guarantee agreement, still contract language should be given its ordinary meaning._*Cambridge Townhome, LLC v. Pacific Star Roofing, Inc.* 166 Wn2d 475, 209vp.3D 863 (2009). Ralph Klose, the Port's attorney drafted the Escrow agreement language (Declaration January 23, 2012 (CP 88-178). So even if that language was ambiguous as it must be interpreted most strongly against the Port, *Dirk v. Amerco Marketing Co. of Spokane*, 88 Wn.2d 607, 565 P.2d 90 (1977). Ambiguous language in written instruments should be construed against the party using the language. *Gaylord v. Tacoma School Dist. Nol 10*, 88 Wn.2d 286, 559 P.2d 1340, *certiorari denied* 434 U.S. 879, 98 S.Ct. 234, 54 L.Ed.2d 160 (1977). Clearly the preliminary notice was required before the Port could make any claim. Division 2 of the Court of Appeals agrees *Pierce County v. State* 144 Wn.App. 783, 185 P.3d 594 (2008) *as am on denial of reconsideration.*

Documents relating to the same subject matter that are executed as part of the same transaction are to be construed as part of the same instrument, *Parker v. BankAmerica, Corp.*, 50 F.3d 757 (C.A, 9[Wash] 1995); *Matter of Estates of Whal*, 99 Wn,2d 828, 664 P.2d 1250 (1983). Even Division 2 agrees with that statement, *Dennis v. Southworth*, 2 Wn.App 115, 467 P.2d 330 (1970). The requirements of both the PSA and the Escrow agreement must be interpreted together as preconditions to any Port claim.

The Escrow Agreement (A-34) ¶ 11 specifically provides: "Time is of essence of each and every provision of this Agreement." (CP 179-350). Generally where the time within which an option may be exercised is fixed by a contract, that time is of the essence of the contract, unless waived or performance within that time is prevented by the other party. *Olsen v. Northern S. & S.*

*Co.*,70 Wash 493, 127 P.2d 112 (1912). Provision in agreement making time of the essence is generally treated as evidence of mutual intent that specified times of performance be strictly construed. *Mid-Town Ltd. Partnership v. Preston*, 69 Wn.App 227, 848 P.2d 1268, *reconsideration denied, review denied*, 122 Wn.2d 1006, 859 P.2d 1006 (Div. 1 1993). Where agreement makes time of essence and fixes termination date and no conduct gives rise to estoppel or waiver, the agreement becomes legally defunct upon stated termination date if prior performance is not tendered. *Vacova Co. v. Farrell*, 62 Wn.App. 386, 814 P.2d 255 (Div. 1, 1991).

**Failure to Timely Claim Bars Recovery**

The Escrow Agreement is specific in its nature and must be strictly construed according to its terms, *Wilson Court, Ltd., Partnership v. Toni Maroni's, Inc.*, 134 Wn.2d 692, 952 P.2d 540 (1998), *Hansen Service v. Lunn,* 155 Wash. 42, 283 P.695 (1930). The Port's right to make any claim against the C.P.B. & L Trust Escrow and the Title Company's right to recognize any such claim both became defunct at midnight, May 25, 2011. A contract which by its terms has expired is legally defunct. *Thayer v. Damiano*, 9 Wn.App. 207, 511 P.2d 84 (Div. 3, 1973). The Trust was entitled to payment from 12:01 am on May 26, 2011, the fifth anniversary date by the express terms of the Escrow Agreement, not 12:01 am on May 27, 2011, the day after the fifth anniversary date. The Trust's contract to reimburse the Port for any claimed losses expired at midnight, May 25, 2011. On May 26, 2011, the only right the Title Company had left was the right and obligation to pay the $500,000 to the Trust, ¶ 10 Escrow Agreement.

**It Was A Guarantee Agreement**

The only possibility for the Port to win, was to argue that the $500,000 that the Trust put us was not a funded guarantee because under Guarantee law, the Port automatically lost. So the Port

advanced, and the courts below bought, the argument that the escrow agreement was more than a guarantee but was a separate contract supported by consideration of release of MTCA liabilities of the Trust, a l liability that was merely assumed but never shown or proved. There was no consideration for the Trust to commit $500,000 of the funds owing it by Marine View, Inc., to be placed in escrow to pay claims of the Port of Tacoma, except for the potential debts of Marine View, Inc., which clearly makes this a guarantee contract. *Waren v. Washington Trust Bank*, 19 Wn.App. 348 575 P.2d 1077, *review granted* 90 Wn.2d.1022, *modified* 92 Wn.2d 381, 598 P.2d 701 (Div. 3, 1978). C.P.B. & L. Trust has the right not to have its guarantee enlarged, *Old National Bank of Washington v. Seattle Smashers Corp*, 36 Wn.App. 688, 676 P.2d 1034 (1984 Div. 1). Where the guarantee is conditional, the guarantor's obligation may not be enforced unless the conditional event has occurred or conditional act has been performed. The guarantee was conditional based upon prior notices required in the Escrow and PSA agreements. *Bellevue Square Managers v. Granbery*, 2 Wn.App. 760, 469 P.2d 969, review denied 78 Wn.2d 994 (1970). Marine View even recognized its own responsibility to reimburse the Trust for some of the potential losses though the Trust chose to release it from full responsibility for all losses under the guarantee. (Appendix ER 3: Declaration of Liberty Waters filed January 23, 2012. §8 A-35 et seq.)

**Metals Not hazardous Waste Before Excavation**

*Taliesen Corp. v. Razore Land Co.,* 135 Wn.App. 106, 127, 144 P.3d 1185 (2006). Each liable party "is strictly liable, jointly and severally, for all remedial action costs and for all natural resource damages resulting from the releases or threatened releases of hazardous substances." There really was no evidence that the Trust released or threatened to release any hazardous substances. Under RCW 70.105D.040 five persons are designated as possibly liable for MTCA damages and the Trust

fits none of them.

The Escrow Agreement denied the Trust any defenses it had under the MTCA. Furthermore "in order to impose remedial costs for cleanup of a defendant, a plaintiff must prove that the hazardous substance poses a threat or potential threat to human health or environment." *Seattle City Light v. Dep't of Transportation*, 98 Wn.App. 165, 989 P.2d 1164 (1999) This could also be very difficult to do as the supposed materials has been sitting there for at least decades posing no threat to the health or environment, just as some five to six hundred acres we pointed out of the Port's property or within its jurisdiction has existed for decades and continues to exist and has not apparently required any MTCA environmental cleanup (CP 988-1016) It was the Port's action of changing this commercial industrial , gravel pit property into environmental tide pools and fish ponds that released any environmental toxic wastes and is the primary culprit. Remediation was only necessary to comply with the Port's desire for a Wildlife Habitat (Conner's declaration June 15, 2012 (CP 865, 860-922). There was no MTCA Toxic metals waste until the Port sought to release it to build a Wild Life Habitat on land where it has actual knowledge of Metals exceeding MTCA standards even before the sale to the Port.

**Substantial Public Interest**

**Dangerous to the Entire Commercial Lending Practices**

In order to find this was not a guarantee contract the courts below had to find that the Trust had to receive some additional consideration other than the potential debt of Marine View. It did so by assuming that the Trust had MTCA type of liability. There is no evidence of this. The Trust was the secured creditor (for over ten years) of Marine View prior to the property sale to the Port. It was the beneficiary of a deed of trust given as security interest for the debt owed by Marine View to Mrs.

Fjetland in the purchase of the property, a debt assigned to the Trust to collect and administer. The Trust never owned the property, never operated the property, and no where in the record is there any evidence that the Trust ever assumed any MTCA type of liability. If that assumption can be made, perhaps every other bank or lending institution in the past having a security interest in the property may be in jeopardy. The position is totally unsupported by any evidence and it results in novel legal assumptions and conclusions without precedence in this State, This decision is dangerous to the entire commercial lending practices in this state.

**Equal protection - Evidence Does Not Meet Summary Judgment Standards**

To quote the Port's own statement of evidence law needed to support a summary judgment (Port's Motion for Partial Summary Judgment filed January 27, 2012, p. 8 line 12):

> "Summary judgment is appropriate when the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue about any material fact and, assuming facts most favorable to the non-moving party, establish that the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982); CR56©. Here, there is no genuine issue of material fact."

Appeals Court found supporting Summary Judgment purposes that presumptions that arise from spoilation doctrine that "could have allowed an inference that the alleged destroyed evidence would have been unfavorable to the party who destroyed it" (Dec. P. 10, foot note 10 A-10) can never-the-less be allowed to support the presenting party's claims, the Port, rather than excluding it. So the Court can make up evidence as it goes to support the party it wants to win. No wonder this opinion was never published.

The court ignored the presumptions from silence. Equitable estoppel can arise by silence

when one has a duty to speak. *Sounders v. Lloyd's of London*, 113 Wn.2d 330, 779 P.2d 249 (1989). Silence will compel equitable estoppel where a party knows what is occurring and would be expected to speak. *Ticor Title Ins. Co of California v. Niassel,* 73 Wn.App. 818, 871 P.2d 652 (Div. 2 1994); see also *Peckman v. Milroy*, 104 Wn.App. 887, 17 P,3d 1256 (Div. 3 2001) as amended 144 Wn. 2d 1010, 31 P.3d 1184.

Furthermore, the Port's own evidence supports the assumption that the petroleum deposits were made subsequently to the Port's purchase of the property, as the property was declared clear of petroleum contamination by a report of May 25, 2006 (Appendix Declaration of Liberty Waters January 23, 2012: Environmental Chemical Solutions report dated May 25, 2006, Exhibit 2 A-35 et seq.) ) While Mark Degal of Hart Crowser testifies that the Petroleum contamination existed before 2006, (Appendix ER 7 Declaration of Mark Dagel Filed June 15, 2012: §7 p 7 A-41v et seq.) he failed to account for what the Hart Crowser report of June 27, 2011 exhibited in ventricle representations of all of the larger section of the contamination was above the water level and only about half of the other section was below the water level, and there is no showing of what was the composition of native soil that might absorb petroleum contamination or how it could be there before the fill when half was in the fill. His only showing supporting his assumptions are not facts but professional qualifications. This is further emphasized by the report of Hart Crowser of June 24, 2011 regarding petroleum contamination:

> 4.1.2.1 Soil. Impacted soils were found to be scattered throughout the fill, with no clear pattern of occurrence that could be correlated vertically or horizontally to the lithologies, specific debris, or known areas or historical operations.

So there is no clear evidence that the contamination existed before 2006 and the chief w2itness

is contradicted by his company's own report. Conners was impeached but the court ruled that it could consider her testimony even if when was impeached, and all on summary judgment. Yet they threw out much of the evidence from personal observations of the author. Total inequality.

Furthermore, there was clear evidence that the Port considered at least 600 acres of slag filled tidelands, filled by Bill Fjetland who drew the over 20 year old map before he died showing numerous slag filled sites from McCord Lewis in the south to southern King County, including his own super fund site referred to by the Port. Who knows how many other slag filled sites exist in the port district filled by other dirt haulers. So clear evidence was submitted that Asarco slag was not, and certainly was not considered by the Port, as any substances that needed remediation as they sat. The Port tries to get over this by repeatedly saying the Land was planed to be a nature habitat requiring huge excavations, but there is no evidence that this was known when the land was purchased from Marine View, or if it was known, that such knowledge was conveyed to the Trust which consdiered the land, as the Port described it, as industrial land. In fact, we are not that familiar with industrial port authorities taking tax money and public credit for buying land to make it into a nature habitat. Apparently they only became hazardous substances when they were dug up, after purchase. And when the Port realized how weak that claim was, it added the late petroleum claims. But it hardly needed to worry given the discrimination practiced by the courts below.

The Appellate Court found consideration to the Trust (beyond that required by a guarantee) from the release of and that the Port put the money into escrow (which it did not)

"Here, the Trust allowed the Port to place $500,000 of the property's sale proceeds in escrow, subject to the Port's later claims for environmental cleanup costs within 5 years of closing. In

exchange, the Port agreed to release the Trust from MTCA liability for any hazardous substances found on the property. Thus, formation of this escrow agreement included a bargained-for exchange of promises, including the requisite consideration." (A - 13)

The Court of Appeals never determined why the Trust had any MTCA liabilities, but refused to consider the Trust's arguments that it did not. Furthermore, despite the clear, unambiguous language of both the PSA and Escrow agreements, the Appeals Court found there were no conditions precedent to the Port making any claims. (A.- 16)

The Appeals Court just refused to address the argument that the contracts had 'Time of Essence" clauses saying the Trust did not develop this argument despite the Trust's appeal brief asserting:

> Generally where the time within which an option may be exercised is fixed by a contract, that time is of the essence of the contract, unless waived or performance within that time is prevented by the other party. *Olsen v. Northern S. & S. Co.*,70 Wash 493, 127 P.2d 112 (1912). Provision in agreement making time of the essence is generally treated as evidence of mutual intent that specified times of performance be strictly construed. *Mid-Town Ltd. Partnership v. Preston*, 69 Wn.App 227, 848 P.2d 1268, *reconsideration denied, review denied*, 122 Wn.2d 1006, 859 P.2d 1006 (Div. 1 1993). Where agreement makes time of essence and fixes termination date and no conduct gives rise to estoppel or waiver, the agreement becomes legally defunct upon stated termination date if prior performance is not tendered. *Vacova Co. v. Farrell*, 62 Wn.App. 386, 814 P.2d 255 (Div. 1, 1991).

The Court of Appeals does not even have to read the disfavored party's brief. This is equal protection of the laws???

**Equal Protection Violated**

Besides the one sided nature of other legal and factual findings, the Appeals Court even interjected the supposed failure of he Trust to apply for apportionment of MTCA claims, which the Trust never did as that was immaterial because the Trust was never liable for MTCA claims, which the Court of Appeals refused to consider (A-7) even though the Court presumes or assumed that beneficiaries of deeds of trust including the Trust, are liable to MTCA claims (Dec, p.7 A-7). That is a very unusual double standard of review of only considering arguments against the appealing party.

Denial of equal protection may occur when valid law is administered in a manner that unjustly discriminates between similarly situated persons as the evidence and law was here. *Stone v. Chelan County Sheriff's Dept.* 110 Wn.2d 806, 756 P.2d 736 (1988). The rights to equal protection of the laws is the same under the Washington State Constitution privileges and immunities clauses as the Federal equal protection clause, *Tunstal ex rel Tunstal v. Bergeson*, 141 Wn.2d 201, 5 P.3d 691, cert. Den. 532 U.S. 920, 121 S.Ct. 1356, 149 L.Ed. 286 (2000). This requires that a person similarly situated with respect to the legitimate purposes of the law is required to receive like treatment, and not have every ruling go against him even when there is no evidence to support such a ruling. *Petition of Runyan,* 121 Wn.2d 432, 853 P.2d 424 reconsideration denied (1993). See also *Shanks v. Oregon-Washington R. & Nav. Co.*, 98 Wash. 509, 167 P. 1074 (1917).

The court could only rule in favor of the Port by ignoring the rights of the Trust as expressed in the Purchase and Sale Agreement and the Escrow Agreement.

> "The aim and purpose of the special privileges and immunities provision of Art. 1 § 12 of the state constitution and the equal protection clause of the fourteenth amendment of the Federal constitution is to secure equality of treatment of all persons, without undue favor on

the one hand or hostile discrimination on the other.

*State ex rel Bacish v. Huse*, 187 Wash. 75, 59 P.2d 1101 (1936) cited in *Alton v. Philips Co. V. State*, 65 Wn. 2d 19, 202, 396 P.2d 537 (1964) holding that one person cannot be granted "recourse in the courts of our state which is not afforded another. 65 Wn.2d @ 204.

**Substantial Justice Not Observed - Summation of the Evidence**

The Courts below completely misinterpreted the evidence even submitted by the Port. The Port claims a loss of over $500,000 from metals contamination (Asarco Slag) remediated in 2010 which it had knowledge about before it purchased the property, (and did not share with the Trust) but discounted and chose to take the risk of further discoveries. It was the same contamination that was common in the Port District filling of tide lands as shown by the over 20 year old map filled in by the late Bill Fjetland, admitted by the Port to have been a supplier of Asarco slag fill. That map shows how one dirt contractor supplied Asarco fill to probably over 600 acres of land in the Port District including under the foundations of the Port's own offices. So we may conclusively presume the Port had knowledge of those conditions, and it was show that for the most part the Pot has not remediated these sites and offers no evidence that it plans to do so, indicating that the "metal's contamination" throughout the Port district is stable and poses no hazardous waste that need to be remediated, at least until the Port chose to move it, which indicates that is when the hazardous waste is created.

The Port also claims over two million dollars for losses because of Petroleum contaminants. It relies upon the extensive curriculum vitae of its two "experts" who observed that some of the oil had penetrated the original tide lands in one of the two areas. Based upon this, its smell. sheen and the fact that oil floats he determined that the oil had been deposited before the fill had been placed, sometime presumably after 1950, and therefore must have been placed before the Port purchased the property.

Yet the port presented other evidence at the time of the purchase that the property was clear of petroleum contaminants. Furthermore the horizontal and vertical graphics of the site presented by the Port show the oil contaminants over or adjacent to known tidal channels and perhaps half of the oil on one site and all of it on the larger site, are above the original tide lands. Furthermore there is no discussion of the properties of the tide lands to absorb oil. Well the tide goes in and out twice a day and it does not take a PhD to determine that and there are no pipes or channels shown on the vertical graphs for the deposit of the oil to the surface so, despite the "expert" opinion doesn't common sense say the oil was probably deposited after purchase and that this is probably a common condition up and down the banks of Hylebos creek. That probably accounts for the report of Hart Crowser of June 24, 2011 finding no conclusions on the history of the oil deposits. Or do we just award victory to who can hire the most"experts," or who has the most political influence in that court district.

## F. CONCLUSION

This court should accept review for the reasons indicated in Part E.

September 29, 2014

Respectfully submitted,

Edward D. Campbell, WSBA # 439
Attorney for Petitioner
C.P.B. & L. Trust

APPENDIX



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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|---|---|
| THE PORT OF TACOMA,<br>a Washington municipal corporation,<br>Respondent,<br><br>v.<br><br>EDWART D. CAMPBELL, as trustee for the CPB&L TRUST, and<br><br>Appellant,<br><br>CHICAGO TITLE INSURANCE COMPANY,<br><br>Defendant. | UNPUBLISHED OPINION<br>**No. 43940-9-II**<br>**DIVISION II** |

HUNT, P.J. — C.P.B. & L. Trust appeals the superior court's summary judgment ordering the release of escrow funds to the Port of Tacoma under an agreement allowing the Port to recover part of a property's purchase price to offset environmental cleanup costs in exchange for the Trust's release from Model Toxics Control Act (MTCA)[1] liability. The Trust argues that (1) it could not be held accountable for environmental cleanup costs until an equitable apportionment of those costs under the MTCA occurred; (2) the superior court violated the

[1] ch. 70.105D RCW.

Trust's equal protection[2] rights by awarding the escrow funds to the Port; (3) the superior court should not have considered a perjurious declaration about the cost to remediate hazardous substances on the property; (4) the spoliation doctrine should have precluded the superior court's considering the Port's requested remediation cost because the Port destroyed other remediation cost evidence when it removed contaminated soil from the property; (5) the Port improperly asserted control over the escrow funds; (6) the escrow agreement was unenforceable because it was not supported by consideration; (7) the superior court did not comply with CR 56(h) because its summary judgment order failed to include each document submitted to the superior court; (8) the Port's claim to the escrow funds was untimely because the Port did not make its claim within the five years specified in the escrow agreement; (9) the escrow agreement was a guarantee and, therefore, the Port was required to comply strictly with the agreement's 21-day notice and comment period in order to claim the funds; (10) the escrow agreement's notice and comment period was a condition precedent to the Port's ability to recover the funds; (11) the escrow agreement's "time is of the essence" clause barred the Port's recovery of the escrow funds; (12) equitable estoppel barred the Port's hazardous substance remediation claim because it failed to inform the Trust about hazardous substances discovered on the property in 2009; and (13) the superior court abused its discretion in awarding attorney fees to the Port. The Trust also requests attorney fees on appeal under the escrow agreement.

We hold that (1) the Trust failed to preserve its MTCA-related claims because neither party asserted MTCA claims below, and the superior court did not address them; (2) the Trust

[2] WASH. CONST. art I, § 12.

failed to support its equal protection claim adequately; (3) the trial court properly considered the challenged declaration because its statements were not perjurious; (4) because the Port's environmental consultants retained samples of the contaminated soil, there was no spoliation; (5) because control over the escrow funds is not disputed, .the Trust's argument on this point lacks merit; (6) the escrow agreement was supported by consideration in that the Trust allowed a portion of the Port's purchase price to be placed in escrow in exchange for the Trust's release from MTCA liability for removal of the property's hazardous substances; (7) even assuming, without deciding, that the superior court's summary judgment order erroneously omitted certain documents, any error was harmless; (8) the Port's claim to the escrow funds was timely; (9) the Trust does not show why the escrow agreement should be interpreted as a guarantee; (10) the escrow agreement's notice and comment period was not a condition precedent to the Port's ability to recover the escrow funds; (11) the Trust does not show why the escrow agreement's "time is of the essence" clause bars the Port from recovering the escrow funds; (12) the Trust's equitable estoppel claim fails because there was no evidence that the Trust suffered any injury from its inability to comment on the Port's remediation plan within the specified period; and (13) the Trust fails to support its challenge to the superior court's attorney fee award to the Port. Therefore, we affirm the superior court's grant of summary judgment and award of attorney fees to the Port. And we award attorney fees on appeal to the Port as the prevailing party under the escrow agreement.

## FACTS

### I. PURCHASE OF CONTAMINATED PROPERTY; ESCROW AGREEMENT

On May 26, 2006, the Port purchased Tacoma property from Marine View, Inc., to create a habitat mitigation area. The Trust was a secured lienholder on the property. Because the property had been used as a depository for construction debris and other materials, the Port had concerns about the potential for hazardous waste and the cost to remediate the contamination; so it bargained for an agreement with the Trust and with Marine View to place $500,000 of the purchase price in escrow. This agreement allowed the Port to make later claims on the escrow funds to cover environmental cleanup costs within five years of the closing date.

The agreement further provided that if the Port discovered hazardous substances on the property, (1) before beginning remediation work, it must provide notice to the Trust of the property's condition and a cost estimate for remediating the condition; (2) the Trust would have 21 days to comment on the proposal before the Port began its remediation work; and (3) any funds remaining in the escrow account were to be released to the Trust on the fifth anniversary of the closing date. In exchange for the Trust's agreement to hold $500,000 of the purchase price in escrow, the Port agreed to release the Trust from any future environmental &aims under the MTCA.

In 2009, the Port discovered metals and petroleum contamination on the property. During construction on the habitat mitigation project in 2010, the Port discovered that the contamination was more extensive than estimated in 2009 and required removal. Because the Port had already begun habitat mitigation construction, it immediately removed the contaminated soil for efficiency reasons because the Port's contractor and necessary excavation equipment

were already on site, allowing the Port to take advantage of pre-arranged, competitive disposal rates for the contaminated soil. The Port spent over $5 million to remediate this contamination.

On May 23, 2011, the Port sent a letter to the Trust stating that it had discovered metals contamination on the property and demanding reimbursement of the $500,000 held in escrow. The Trust opposed release of the funds to the Port because the Trust had received the letter on May 26, 2011, which notice the Port claimed was one day late—one day after expiration of the five-year period for making claims against the escrow account, based on the May 26, 2006 closing date for the property's purchase. The Trust also asserted that the Port had materially breached the terms of the escrow agreement by failing to comply with the 21-day notice and comment period before engaging in the contamination remediation.

## II. LAWSUIT

In November 2011, the Port filed a complaint against the Trust[3] for breach of contract, seeking release of $490,000[4] from the escrow account and attorney fees for having to sue to enforce the escrow agreement.

The Trust moved for summary judgment, arguing that (1) the escrow agreement was a guarantee requiring strict compliance with its terms, and (2) the Port's failure to comply with the 21-day notice and comment period requirement nullified the Port's claim to the escrow funds. The Port also moved for partial summary judgment, asking the court to rule that the Port's failure

3 The Port also named the parties' escrow agent, Chicago Title Insurance. Company, in the complaint. The Port later dismissed its complaint against Chicago Title after Chicago Title agreed to deposit the escrow funds in the trial court clerk's registry.

4 In October 2011, the Port had authorized Chicago Title to release $10,000 from the escrow account

to the Trust for reasons unrelated to this case. Thus, the Port sued for only the remaining $490,000 of the agreement's original $500,000.

to comply with the comment period was not a bar to its recovering the escrow funds because (1) this failure was not a material breach of the escrow agreement, and (2) the comment period was not a condition precedent to performance based on the plain terms of the contract. The superior court denied both parties' summary judgment motions, reasoning that there were material issues of fact regarding interpretation of the escrow agreement.

In April 2012, the Trust filed a second summary judgment motion. It argued that the escrow agreement was defunct and had expired because the Port had failed to make a claim to the funds before the fifth anniversary of the property's purchase closing date. The Trust argued that the agreement's "time is of the essence" clause strengthened this requirement to comply strictly with the five-year limitation. Clerk's Papers (CP) at 436. The Port also filed a second summary judgment motion, supported with a declaration from Leslee Conner, an engineer for the Port's remediation group.

Conner declared that there was contamination from metals and petroleum on the property, which conclusion she supported with attached reports establishing the extent of the contamination and the necessity for removing the contaminated soils to comply with state regulations. Conner further stated that (1) the methods the Port used to remediate the contamination were the most cost effective; and (2) even if the Port had provided the Trust with notice of the remediation, it was "inconceivable" that any comment the Trust could have made would have reduced the costs to less than the $490,000 available in the escrow account. CP at 867.

The superior court denied the Trust's summary judgment motion, granted summary judgment to the Port, awarded the Port attorney fees and costs under the escrow agreement, and

awarded the Port a $490,000 judgment to be satisfied from the escrow deposit in the clerk's registry. The Trust unsuccessfully moved for reconsideration. The Trust appeals.

## ANALYSIS

The Trust challenges the superior court's summary judgment order releasing escrow funds to the Port on several grounds. To the extent that the Trust has provided sufficient argument supporting these challenges, we address each in turn.

### I. STANDARD OF REVIEW

We review de novo a superior court's decision on summary judgment. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Summary judgment is appropriate where, viewed in the light most favorable to the nonmoving party, the evidence presents no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 271, 285 P.3d 854 (2012). The parties here do not dispute the material facts. Accordingly, the remaining issues are questions of law, which we review de novo. *Boag v. Farmers Ins. Co.*, 128 Wn. App. 333, 339, 115 P.3d 363 (2005).

### II. FAILURE TO PRESERVE MTCA CLAIMS

The Trust argues that the superior court erred in ordering it to release the escrow funds to the Port because the Port could not be held liable for remediation costs until an equitable apportionment of those costs was conducted under the MTCA, chapter 70.105D RCW.[5] These MTCA-based arguments are not relevant to our analysis of the Trust's liability because neither

5 More specifically, the Trust argues that (1) it was not liable under the MTCA because it did not "release" any hazardous substances on the property; (2) it was not a party that could be held liable under the MTCA under RCW 70.105D.040; and (3) there was no proof that the hazardous substances on the property posed a threat to human health or the environment.

party asserted MTCA claims below, and the superior court did not address them.[6] We may refuse to review any claim of error not raised in the trial court. RAP 2.5(a); *Hall v. Feigenbaum,* 178 Wn. App. 811, 817-18, 319 P.3d 61, *review denied,* Wn.2d (2014). Accordingly, we do not further address the Trust's MTCA-based arguments.

III. INADEQUATE, EQUAL PROTECTION ARGUMENT

The Trust also argues that the superior court violated its equal protection rights because it failed to give the Trust the benefit of its bargain and failed to enforce applicable contract and guarantee rules by (1) ignoring the Trust's contract defenses against the Port's claims, (2) ignoring the Port's failure to serve or to perfect its claim against the Trust's guaranteed escrow, and (3) jumping directly to the question of whether the Port had a claim for damages. The Trust argues that these alleged deficiencies are "a clear indication that in Pierce County, the Port of Tacoma is being treated as a superior to other litigants in the county." Br. of Appellant at 34. These arguments also fail.[7]

In support of these arguments, the Trust cites only the general equal protection provisions of the Washington and United States constitutions, without explaining how they were violated in the context● of this appeal. Because the Trust's argument on this point is inadequate, we decline to address it further. RAP 10.3(a)(6); *see also In re Marriage of Katare,* 175 Wn.2d 23, 40, 283

6 Rather, the dispute at issue involves the Trust's contractual obligations under the escrow agreement, in which the Port agreed to release the Trust from MTCA liability in exchange for the Port's right to seek reimbursement for future environmental cleanup costs from the $500,000 portion of the property's purchase price deposited in escrow.

7 To the extent that the Trust argues the superior court violated its equal protection rights by reaching a decision unfavorable to the Trust, such argument lacks support and merit.

P.3d 546 (2012) ("IN]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.") (internal quotation marks omitted) (quoting *In re Pers. Restraint of Williams,* 111 Wn.2d 353, 365, 759 P.2d 436 (1988)), *cert. denied,* 133 S. Ct. 889 (2013).

IV. No PERJURY

The Trust next argues that the superior court should not have considered Conner's declaration to establish the necessity and cost of remediation because, it alleges, she "committed perjury in her declaration." Br. of Appellant at 37. The Trust cites only ER 607 and Washington Practice's discussion of this rule to support its argument. The Trust cites no authority to support its contention that the superior court should not have considered the evidence; nor does the Trust make clear what relief it requests. Because the Trust inadequately briefed this argument, contrary to RAP 10.3(a)(6), we do not further consider it.[9]

[8] 5A WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE §§ 607.17-20, at 407-12 (5th Ed. 2007).

[9] But even were we to consider this argument, the Trust would not prevail. First, the Trust mischaracterizes Conner's declaration statements: Conner did not state that the Trust would be liable for cleanup costs under the MTCA, as the Trust alleges. Rather, she (1) described the exchange of promises the parties made when they entered into the escrow agreement; and (2) stated that, in her opinion, had the Port known the extent of the contamination on the property, it would not have limited its recovery to only $500,000. These statements do not claim that the Trust was actually liable under the MTCA; thus, they were not false. Second, these statements were not statements of fact but, rather, legal conclusions about the Trust's potential liability under the MTCA. But there are no MTCA claims at issue in this appeal; thus, the Trust fails to show how Conner's MTCA statements were material so as to amount to "perjury" under RCW 9A.72.020(1), which requires "a *materially* false statement." (Emphasis added.).

## V. NO SPOLIATION

The Trust further argues that the evidence of the Port's remediation costs was inadmissible under the spoliation doctrine because critical evidence was "destroyed" when the Port removed the hazardous substances from the property. Br. of Appellant at 32. We disagree.

As a preliminary matter, we note that the Trust fails to provide any authority or citations to the record supporting its assertion; therefore, the Trust's briefing on the matter does not comply with RAP 10.3(a)(6). Nevertheless, we note that even if the Trust had properly supported its argument with authority and citations to the record, the record does not support its factual assertions. The record shows that no evidence of remediation costs or soil conditions was destroyed. On the contrary, the Port offered to provide the Trust with (1) samples of the contaminated soils that its environmental consultants had retained and (2) accompanying laboratory reports on the contamination; but the Trust did not respond to this offer. Therefore, here, the allegedly destroyed evidence did not warrant application of the spoliation doctrine.[1°]

## VI. CONTROL OVER ESCROW FUNDS NOT DISPUTED

The Trust next argues that the Port incorrectly asserted to the superior court that it (the Port) had sole control over the escrow funds and "could do what it wanted with [those funds] for any remediation." Br. of Appellant at 23. The Trust is correct to the extent that (1) in general, "[o]nce deposited in escrow, an instrument passes beyond the control of the depositor, and he

[1°] We further note, however, that even if evidence had been destroyed such that the spoliation doctrine would apply, the trial court could have allowed an inference that the allegedly destroyed evidence would have been unfavorable to the party who destroyed it, rather than excluding the evidence, as the

Trust argues here. *See Henderson v. Tyrrell,* 80 Wn. App. 592, 605, 910 P.2d 522 (1996).

may not recall it"; and (2) "[u]pon the performance of the condition named, the depositary must deliver it to the grantee. "*Lechner v. Hailing,* 35 Wn.2d 903, 912, 216 P.2d 179 (1950).

But the record here does not show that the Port's assertions about its control over the escrow funds misled the superior court: The superior court did not conclude that the Port retained control over the escrow funds or that Chicago Title was not required to turn the funds over to the Trust on the fifth anniversary of closing. Nor does the Port pursue this position on appeal. Accordingly, we do not further consider this inconsequential issue.

## VII. ESCROW AGREEMENT CONSIDERATION

The Trust also argues that there was no consideration for the Trust's agreement to place $500,000 of the property's purchase price in escrow and, therefore, the escrow agreement was not a valid contract." Again, the record does not support this argument.

We agree with the Trust that to be enforceable, a contract must be supported by consideration. *Keystone Land & Dev. Co. v. Xerox Corp.,* 152 Wn.2d 171, 178, 94 P.3d 945 (2004). "Consideration is a bargained-for exchange of promises." *Labriola v. Pollard Grp., Inc.,* 152 Wn.2d 828, 833, 100 P.3d 791 (2004). Generally, "[w]hether a contract is supported by

[11] The Trust's argument that there was no consideration for the escrow agreement does not correspond to an assignment of error or to a corresponding issue statement, as RAP 10.3(a)(4) and 10.3(g) require. Generally, we will review a claimed error only if it is included in an assignment of error. *Havlina v. Wash. State Dep't of Transp.,* 142 Wn. App. 510, 515 n.1, 178 P.3d 354 (2007). But we also construe the rules of appellate procedure liberally to promote justice and to facilitate the decision of cases on the merits. RAP 1.2(a); *Havlina,* 142 Wn. App. at 515 n.1. Therefore, we may consider issues that do not correspond to an assignment of error where (1) "'the nature of the appeal is clear,'" (2) "'the relevant issues are argued in the body of the brief,'" (3) "'citations are supplied so that the Court is not greatly inconvenienced,'" and (4) "'the respondent is not prejudiced.'" *Havlina,* 142 Wn. App. at 515 n.1 (quoting *State v. Olson,* 126 Wn.2d 315, 323, 893 P.2d 629 (1995)). Because the Trust's escrow agreement consideration argument meets these requirements, we consider its merits.

consideration is a question of law and may be properly determined by a court on summary judgment." *Nationwide Mut. Fire Ins. Co. v. Watson,* 120 Wn.2d 178, 195, 840 P.2d 851 (1992). We do not agree with the Trust, however, that the escrow agreement here lacked consideration and was therefore unenforceable.

Here, the Trust allowed the Port to place $500,000 of the property's sale proceeds in escrow, subject to the Port's later claims for environmental cleanup costs within 5 years of closing. In exchange, the Port agreed to release the Trust from MTCA liability for any hazardous substances found on the property. Thus, formation of this escrow agreement included a bargained-for exchange of promises, including the requisite consideration. We hold, therefore, that the superior court did not err in granting summary judgment to the Port on this ground.

## VIII. COMPLIANCE WITH CR 56(h)

The Trust argues that we should reverse summary judgment to the Port because the superior court failed to comply with CR 56(h) when it did not include in its summary judgment order a list of all the documents it considered.[12] We reject the Trust's request, holding that even if the trial court erred in not listing every document on the summary judgment order, any error was harmless.

CR 56(h) provides: "The order granting or denying the motion for summary judgment *shall designate* the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered." (Emphasis added.). In its order denying the

[12] Again, the Trust's brief does not include an issue statement or assignment of error corresponding to the claimed CR 56(h) violation. Nevertheless, we again exercise our discretion to review this issue on the merits.

Trust's first summary judgment motion and in its order granting the Port's summary judgment motion, the superior court named specifically only 12 of the documents it had considered; but it also noted that it had considered these 12 documents together with "[a]ny other documents and pleadings on file in this case." CP at 425, 428. The Trust argues that because the superior court's summary judgment order listed only 12 of over 60 documents considered, we must reverse the summary judgment. We disagree.[13] The Trust's argument ignores the superior court's explicit statement, noted above, that it in addition to the 12 named documents, it considered "[ajny other documents and pleadings on file in this case." CP at 425, 428.

Furthermore, the Trust cites no authority to support its argument that the summary judgment order's failure to list all documents specifically and individually requires us to reverse the order. On the contrary, where, as here, the documents the superior court referenced in general, but failed to name specifically, in its order are nevertheless included in the record before us on appeal, any error in failing to list those documents in the order is harmless.[14] *W.R. Grace & Co. v. Dep't of Revenue,* 137 Wn.2d 580, 591, 973 P.2d 1011 (1999).

[13] We agree with the Trust that CR 56(h) requires the superior court to list every document it considered in an order granting or denying summary judgment. We disagree, however, with the Trust's claim that reversal is the remedy for this violation.

[14] Despite holding that the superior court's failure to list all documents does not require reversal here, we note that this holding does not relieve trial courts from complying with CR 56(h) and listing in summary judgment orders all documents called to the superior court's attention.

## IX. TIMELINESS OF PORT'S CLAIM

The Trust next argues that the Port may not recover the escrow funds because it failed to make a claim against those funds within five years of the property's closing date, as the escrow agreement required. The record does not support this assertion.

The escrow agreement required the escrow funds to be disbursed to the Port if "within five (5) years of the 'Closing Date,'" the Port provided notice to the Trust that it had discovered hazardous substances on the property that had been on site before the closing date. CP at 229. The agreement further provided that if the Port had made no claim to the escrow funds by "the fifth (5th) anniversary of the Closing Date," these funds would be disbursed to the Trust on that date. CP at 230. The property's closing date was May 26, 2006; the Trust received notice of the Port's claim for reimbursement from the escrow funds five years later, on May 26, 2011. The Trust argues that (1) the Port lost its right to claim the funds at midnight on May 25, 2011; and (2) therefore, the Port could not recover the funds from the escrow account on May 26 because at that point, the funds belonged to the Trust.

The Port counters, and we agree, that it had until May 26, 2011, the fifth anniversary of the closing date, to make a claim to the escrow funds. When computing time from a particular date, the general rule excludes that start date. *See Perkins v. Jennings,* 27 Wash. 145, 149, 67 P. 590 (1902). Moreover, the plain meaning of the term "anniversary" connotes the same month and day in a later year. *See Webster's Third New International Dictionary* 87 (2002). We hold, therefore, that (1) the escrow agreement's five-year period began on May 27, 2006, and its five- year "anniversary" fell on May 26, 2011; (2) accordingly, the Port had until May 26, 2011, to make a claim to the escrow funds; (3) the Port's May 26, 2011 claim was timely under the

agreement; and (4) the superior court did not err in concluding as a matter of law that the agreement required the remaining escrow funds to be disbursed to the Port.

X. PORT'S FAILURE TO COMPLY WITH 21-DAY NOTICE AND COMMENT PERIOD

The Trust makes four arguments about the Port's failure to comply with the escrow agreement's 21-day notice and comment period,[15] all of which fail. We address each in turn.

A. No showing of guarantee

The Trust first argues that the escrow agreement was a "guarantee" that had to be strictly enforced according to its terms. Br. of Appellant at 26. We disagree.

The Trust does not specifically explain the effect of a guarantee on interpreting the escrow agreement here, contrary to RAP 10.3(a)(6). Instead, the Trust's brief cites basic guarantee principles and offers only the following argument:

> The escrow agreement is nothing more than a contract to answer for the debts, the guarantee of certain specific obligations of Marine View, Inc. The Trust never had any obligation to perform any remediation on the property nor did it have any independent liability for such needs or actions because any independent liability it might have had was released in the Purchase and Sale agreement.

15 The pertinent portion of the escrow agreement provided:.

> If within five (5) years of the "Closing Date" under the Purchase Agreement, the Port discovers . . . any hazardous substances . . . on the Property . . . the Port shall give notice to Marine View Inc. and the Trust (with a copy to Escrow Agent) of such discovery on the Property, which notice shall include a detailed estimate prepared by a qualified independent contractor qualified to contract with the Port of the cost to the Port to . . . remediate such hazardous substances. . . . After the Port furnishes the Trust and Marine View Inc., with notice of such discovery, Marine View, Inc. and the Trust shall each have a reasonable period of not less than 21 days . . . after receipt of notice from the Port . . . to comment upon the proposed remediation before work on said remediation shall commence.

CP at 229.

Br. of Appellant at 26. This argument does not persuade us to adopt the Trust's position. Therefore, we hold that there has been no showing that the escrow agreement was to operate as a guarantee along the lines that the Trust suggests.

B. No condition precedent

The Trust next argues that the 21-day notice and comment period requirement in the escrow agreement was a condition precedent to the Port's making a valid claim against the escrow funds. Again, we disagree.

A condition precedent is an event that must occur before there is a right to immediate performance of a contract. *Tacoma Northpark, LLC v. NW, LLC,* 123 Wn. App.. 73, 79, 96 P.3d 454 (2004). If the condition does not occur, the parties are excused from performance of the contract. *Tacoma Northpark,* 123 Wn. App. at 79. Determining whether the escrow agreement's 21-day notice and comment period was a condition precedent requires us to interpret the escrow agreement, a question of law, which we review de novo. *Dave Johnson Ins., Inc. v. Wright,* 167 Wn. App. 758, 769, 275 P.3d 339, *review denied,* 175 Wn.2d 1008 (2012). Whether a contract provision is a condition precedent or a contractual promise 'depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances.'"[16] *Tacoma Northpark*, 123 Wn. App. at 79 (quoting *Ross*

[16] "[T]he intent of the parties to create a condition precedent may often be illuminated by phrases and words such as 'on condition,' 'provided that,' so that,"when,"while," after,' or 'as soon as.'" *Lokan & Assocs., Inc. v. Am. Beef Processing, LLC,* 177 Wn. App. 490, 499, 311 P.3d 1285 (2013) (quoting *Ross v. Harding,* 64 Wn.2d 231, 237, 391 P.2d 526 (1964)). But such words are not required: "Any words which express, when properly interpreted, the idea that the performance of a promise is dependent on some other event will create a condition." *Ross,* 64 Wn.2d at 237.

*v. Harding,* 64 Wn.2d 231, 236, 391 P.2d 526 (1964)).

To assist in determining the parties' intent, we may apply the "context rule" adopted in *Berg v. Hudesman,* 115 Wn.2d 657, 666-69, 801 P.2d 222 (1990). This "context rule"

> "allows a court, while viewing the contract as a whole, to consider extrinsic evidence, such as the circumstances leading to the execution of the contract, the subsequent conduct of the parties and the reasonableness of the parties' respective interpretations."

*Roats v. Blakely Island Maint. Comm'n, Inc.,* 169 Wn. App. 263, 274, 279 P.3d 943 (2012) (quoting *Shafer v. Bd. of Trs. of Sandy Hook Yacht Club Estates, Inc.,* 76 Wn. App. 267, 275, 883 P.2d 1387 (1994)). The context rule applies even when the provision at issue is unambiguous. *Roats,* 169 Wn. App. at 274. But "[w]here doubt exists as to whether parties have created a promise or an express condition, we should interpret the language in question to create a promise." *Lokan & Assocs., Inc. v. Am. Beef Processing, LLC,* 177 Wn. App. 490, 499, 311 P.3d 1285 (2013).

We generally give contractual language its ordinary, usual, and popular meaning *Jensen v. Lake Jane Estates,* 165 Wn. App. 100, 105, 267 P.3d 435 (2011). "An interpretation of a contract that gives effect to all provisions is favored over an interpretation that renders a provision ineffective." *Snohomish County Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc.,* 173 Wn.2d 829, 840, 271 P.3d 850 (2012). Thus, "`[w]here one construction would make a contract unreasonable, and another, equally consistent with its language, would make it reasonable, the latter more rational construction must prevail.'" *Better Fin. Solutions, Inc. v. Transtech Elec., Inc.,* 112 Wn. App. 697, 712 n.40, 51 P.3d 108 (2002) (quoting *Byrne v.*

Ackerlund, 108 Wn.2d 445, 453-54, 739 P.2d 1138 (1987)).[17] The plain language of the escrow agreement at issue here provided:

> If within five (5) years of the "Closing Date" under the Purchase Agreement, the Port discovers any construction debris or other material on the property which was not deposited pursuant to a valid permit, or discovers any hazardous substances (as defined by any federal, state or local law) on the Property which was not deposited or released onto the Property after the Closing Date, and such materials or condition are not within the scope of the Negotiated Cleanup Obligations, the Port shall give notice to Marine View Inc. and the Trust (with a copy to Escrow Agent) of such discovery on the Property, which notice shall include a detailed estimate prepared by a qualified independent contractor qualified to contract with the Port of the cost to the Port to remove such debris or other material or remediate such hazardous substances. Where practical, the Port shall attempt to obtain a fixed bid for such removal, remediation or resolution. After the Port furnishes the Trust and Marine View Inc., with notice of such discovery, Marine View, Inc. and the Trust shall each have a reasonable period of not less than 21 days with respect to hazardous substances, and 5 days with respect to debris or materials which are not hazardous substances, after receipt of notice from the Port (such 21- or 5- day periods to run concurrently) to comment upon the proposed remediation before work on said remediation shall commence, except in case of emergency threatening life or limb of persons on the Property or immediate destruction of the Property. Upon completion of the removal or remediation, as determined by certification of the qualified independent contractor to the Port, Marine View Inc., the Trust, and Escrow Agent, the Port shall be entitled to reimbursement out of the Escrow Funds held in the Escrow Account for the actual expenses incurred by the Port with respect to such activity, upon delivery to Escrow Agent, with copies to Marine View Inc. and the Trust, of a written demand, documenting the expenses paid by the Port.

CP at 229.

[17] If despite extrinsic evidence, a contract provision's meaning is uncertain or is subject to two or more reasonable interpretations, the provision is ambiguous and we construe that ambiguity against the document's drafter. *Riss v. Angel,* 80 Wn. App. 553, 557, 912 P.2d 1028 (1996), *aff'd,* 131 Wn.2d 612, 934 P.2d 669 (1997); *Jensen,* 165 Wn. App. at 105. The Trust also argues that the environmental cleanup section of the escrow agreement was "clearly the Port's," and, therefore, we should construe any ambiguity against the Port. Br. of Appellant at 27. Because we do not find this language ambiguous, we need not construe it. But even assuming the language was ambiguous, we would construe it as creating a promise, not a condition precedent. *Lokan,* 177 Wn. App. at 499.

This portion of the escrow agreement contained two promises. First, the Port promised to provide 21 days notice to the Trust before remediating hazardous substances on the property. Second, the Trust agreed to allow the Port to be reimbursed from the escrow funds after remediation was completed. There is no language in the agreement, however, suggesting that the Trust's promise to allow release of the funds was dependent on the Port's providing preremediation notice.[18] Accordingly, we hold that the 21-day notice and comment period required by the escrow agreement was not a condition precedent to the Trust's release of the escrow funds to the Port.

C. Time-of-the-essence clause

The Trust also contends that the escrow agreement's provision—"[t]ime is of essence of each and every provision of this Agreement"—bars the Port's recovery of the escrow funds. Br.

[18] Furthermore, the Trust cites no case law supporting its claim that the language at issue here creates a condition precedent. Instead, it makes two arguments about the parties' intent in drafting the escrow agreement, one of which finds no support in the record. First, contrary to the Trust's assertion, the Port's attorney did not state in a declaration that the 21-day comment period was a condition precedent to release of the funds. Instead, this declaration stated that (1) an October 2005 draft of the purchase and sale agreement had originally included a section explicitly prohibiting the Port from proceeding with removal or remediation until the work had been approved by Marine View; but (2) the Port had *rejected* this provision and it was removed from the final agreement.
Second, the Trust argues that the purchase and sale agreement's requirement of cost estimates before the Port commenced remediation work showed that the parties intended the escrow agreement's 21-day comment period to be a condition precedent to reimbursement from the escrow funds. The Trust does not cite to any particular portion of the purchase and sale agreement to support its argument. To the extent that the Trust intended to refer to the purchase and sale agreement provision addressing advance notice to the Trust of hazardous materials and remediation costs, this language similarly shows no intent that notice to the Trust of remediation cost estimates was a condition precedent to release of the funds. Moreover, the Trust fails to show why the existence of cost estimates as a condition precedent in the purchase and sale agreement would affect interpretation of the 21-day comment period in the escrow agreement in our condition precedent analysis.

of Appellant at 29 (internal quotation marks omitted). Because again the Trust does not develop an argument about why this clause bars recovery here, we do not further address this contention.[19] *See* RAP 10.3(a)(6).

D. No injury; no equitable estoppel

The Trust further argues that equitable estoppel bars the Port's recovery of the escrow funds because the Port knew about the hazardous substances on the property as early as 2009 but failed to provide notice of its claims to the funds until 2011. Again, we disagree.

The elements of equitable estoppel comprise:

> "(1) an admission, statement, or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) *injury* to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act."

*Saunders v. Lloyd's of London,* 113 Wn.2d 330, 340, 779 P.2d 249 (1989) (emphasis added) (internal quotation marks omitted) (quoting *McDaniels v. Carlson,* 108 Wn.2d 299, 308, 738 P.2d 254(1987)).

The Trust argues that the Port had a duty under the escrow agreement to provide notice to the Trust 21 days before conducting remediation work. Regardless of the Port's duty to inform the Trust of the existence of the hazardous substances and plans for remediation, the Trust failed to present any evidence that it was injured by the Port's failure to provide such notice. First, the

19 We note, however, that the cases the Trust cites do not support its contention that the "time is of the essence" provision bars the Port's recovery of the escrow funds. Unlike the provision at issue here, *Olsen v. Northern S.S. Co.,* 70 Wash. 493, 127 P. 112 (1912) involved a condition precedent to performance. And *Mid-Town Ltd. P'ship v. Preston,* 69 Wn. App. 227, 848 P.2d 1268 (1993) and *Vacova Co. v. Farrell,* 62 Wn. App. 386, 814 P.2d 255 (1991) involved a party's failure to act within the time specified by the contract. Here, in contrast, the Port acted within the escrow agreement's fixed termination date by providing notice of its claim to the escrow funds to the Trust by the end of the five-year period.

requirement to give the Trust notice of planned remediation allowed the Trust only to comment on the Port's plan, not to prevent the Port from proceeding with remediation. Second, the Trust presented no evidence that it had a more cost-effective remediation plan or that its comments would have changed the nature or outcome of the Port's remediation efforts. Third, and most detrimental to the Trust's argument, the Port's remediation engineer testified that it was "inconceivable" that any comment the Trust could have made would have reduced the costs to less than the $490,000 available in the escrow account. CP at 867. On the contrary, this third uncontroverted fact shows that the Trust suffered no injury from the Trust's failure to provide notice of its remediation plans. Accordingly, we hold that the Trust's equitable estoppel argument fails.

In sum, none of the Trust's arguments about the Port's failure to comply with the escrow agreement's 21-day notice and comment period before undertaking remediation defeat the Port's right to the funds under the escrow agreement.

## XI. ATTORNEY FEES

The Trust also appears to argue that the superior court abused its discretion in awarding attorney fees to the Port below. Although the Trust devotes a section of its brief to its request for fees, in compliance with RAP 18.1(b), it cites no authority to support this argument; therefore, we decline to consider it.[20] RAP 10.3(a)(6).

The Port requests attorney fees on appeal under RAP 18.1 and under the escrow agreement. The escrow agreement provides that in any litigation between the parties to enforce

[20] Nevertheless, we note that because the Trust was not the prevailing party below, nor does it prevail on appeal, it would not be entitled to attorney, fees under the escrow agreement.

the agreement, the prevailing party "shall be entitled to be reimbursed by the other Party for all of the reasonable legal fees and disbursements such prevailing party has incurred in connection with such litigation, including any appeal therefrom." CP at 232. Because the Port is the prevailing party on appeal, we grant its request for attorney fees.

We affirm the superior court's grant of summary judgment and its attorney fee award to the Port. And we award the Port attorney fees on appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.
Hunt, P.J.

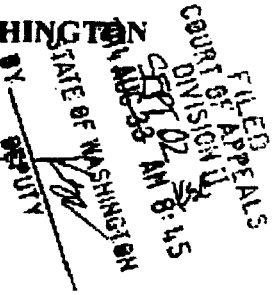
We concur:

Worswick, J.
Worswick, J.

Melnick, J.
Melnick, J.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

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| THE PORT OF TACOMA, a Washington municipal corporation,<br>Respondent,<br><br>v.<br><br>EDWART D. CAMPBELL, as trustee for the CPB&L TRUST, and<br>Appellant,<br><br>CHICAGO TITLE INSURANCE COMPANY,<br>Defendant. | No. 43940-9-II<br><br>ORDER DENYING MOTION TO PUBLISH, DENYING MOTION TO RECONSIDER, AND GRANTING RESPONDENT'S ATTORNEY FEES |

**APPELLANT,** C.P.B. & L. Trust, moves for publication and reconsideration of the Court's **July 8, 2014** unpublished opinion in the above-referenced matter. Respondent, Port of Tacoma, filed responses to C.P.B. & L.'s motions and requested attorney fees incurred in preparing its response to the motion to reconsider. Upon consideration of the motions, (1) the court denies the Trust's motion for publication; (2) the court denies the trust's motion for reconsideration; and (3) the court grants the Port's request for attorney fees incurred in preparing its response to the motion for reconsideration. Accordingly, it is

**SO ORDERED.**

**PANEL:** Jj. Hunt, Worswick, Melnick

**DATED** this 2nd day of September, 2014.

**FOR THE COURT:**

Hunt, J.
Presiding Judge

**14th Amendment, United States Constitution**:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Art. 1 § 12 Washington State Constitution**

SPECIAL PRIVILEGES AND IMMUNITIES PROHIBITED. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

## RCW 70.105D.040 Standard of liability — Settlement.

(1) Except as provided in subsection (3) of this section, the following persons are liable with respect to a facility:

(a) The owner or operator of the facility;

(b) Any person who owned or operated the facility at the time of disposal or release of the hazardous substances;

(c) Any person who owned or possessed a hazardous substance and who by contract, agreement, or otherwise arranged for disposal or treatment of the hazardous substance at the facility, or arranged with a transporter for transport for disposal or treatment of the hazardous substances at the facility, or otherwise generated hazardous wastes disposed of or treated at the facility;

(d) Any person (i) who accepts or accepted any hazardous substance for transport to a disposal,

treatment, or other facility selected by such person from which there is a release or a threatened release for which remedial action is required, unless such facility, at the time of disposal or treatment, could legally receive such substance; or (ii) who accepts a hazardous substance for transport to such a facility and has reasonable grounds to believe that such facility is not operated in accordance with chapter 70.105 RCW; and

(e) Any person who both sells a hazardous substance and is responsible for written instructions for its use if (i) the substance is used according to the instructions and (ii) the use constitutes a release for which remedial action is required at the facility.

(2) Each person who is liable under this section is strictly liable, jointly and severally, for all remedial action costs and for all natural resource damages resulting from the releases or threatened releases of hazardous substances. The attorney general, at the request of the department, is empowered to recover all costs and damages from persons liable therefor.

(3) The following persons are not liable under this section:

(a) Any person who can establish that the release or threatened release of a hazardous substance for which the person would be otherwise responsible was caused solely by:

(i) An act of God;

(ii) An act of war; or

(iii) An act or omission of a third party (including but not limited to a trespasser) other than (A) an employee or agent of the person asserting the defense, or (B) any person whose act or omission occurs in connection with a contractual relationship existing, directly or indirectly, with the person asserting this defense to liability. This defense only applies where the person asserting the defense has exercised the utmost care with respect to the hazardous substance, the foreseeable acts or omissions of the third

party, and the foreseeable consequences of those acts or omissions;

(b) Any person who is an owner, past owner, or purchaser of a facility and who can establish by a preponderance of the evidence that at the time the facility was acquired by the person, the person had no knowledge or reason to know that any hazardous substance, the release or threatened release of which has resulted in or contributed to the need for the remedial action, was released or disposed of on, in, or at the facility. This subsection (b) is limited as follows:

(i) To establish that a person had no reason to know, the person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property, consistent with good commercial or customary practice in an effort to minimize liability. Any court interpreting this subsection (b) shall take into account any specialized knowledge or experience on the part of the person, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection;

(ii) The defense contained in this subsection (b) is not available to any person who had actual knowledge of the release or threatened release of a hazardous substance when the person owned the real property and who subsequently transferred ownership of the property without first disclosing such knowledge to the transferee;

(iii) The defense contained in this subsection (b) is not available to any person who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance at the facility;

(c) Any natural person who uses a hazardous substance lawfully and without negligence for any personal or domestic purpose in or near a dwelling or accessory structure when that person is: (i) A resident of

the dwelling; (ii) a person who, without compensation, assists the resident in the use of the substance; or (iii) a person who is employed by the resident, but who is not an independent contractor;

(d) Any person who, for the purpose of growing food crops, applies pesticides or fertilizers without negligence and in accordance with all applicable laws and regulations.

(4) There may be no settlement by the state with any person potentially liable under this chapter except in accordance with this section.

(a) The attorney general may agree to a settlement with any potentially liable person only if the department finds, after public notice and any required hearing, that the proposed settlement would lead to a more expeditious cleanup of hazardous substances in compliance with cleanup standards under RCW 70.105D.030(2)(e) and with any remedial orders issued by the department. Whenever practicable and in the public interest, the attorney general may expedite such a settlement with persons whose contribution is insignificant in amount and toxicity. A hearing shall be required only if at least ten persons request one or if the department determines a hearing is necessary.

(b) A settlement agreement under this section shall be entered as a consent decree issued by a court of competent jurisdiction.

(c) A settlement agreement may contain a covenant not to sue only of a scope commensurate with the settlement agreement in favor of any person with whom the attorney general has settled under this section. Any covenant not to sue shall contain a reopener clause which requires the court to amend the covenant not to sue if factors not known at the time of entry of the settlement agreement are discovered and present a previously unknown threat to human health or the environment.

(d) A party who has resolved its liability to the state under this section shall not be liable for claims for contribution regarding matters addressed in the settlement. The settlement does not discharge any of the other liable parties but it reduces the total potential liability of the others to the state by the amount of

the settlement.

(e) If the state has entered into a consent decree with an owner or operator under this section, the state shall not enforce this chapter against any owner or operator who is a successor in interest to the settling party unless under the terms of the consent decree the state could enforce against the settling party, if:

(i) The successor owner or operator is liable with respect to the facility solely due to that person's ownership interest or operator status acquired as a successor in interest to the owner or operator with whom the state has entered into a consent decree; and

(ii) The stay of enforcement under this subsection does not apply if the consent decree was based on circumstances unique to the settling party that do not exist with regard to the successor in interest, such as financial hardship. For consent decrees entered into before July 27, 1997, at the request of a settling party or a potential successor owner or operator, the attorney general shall issue a written opinion on whether a consent decree contains such unique circumstances. For all other consent decrees, such unique circumstances shall be specified in the consent decree.

(f) Any person who is not subject to enforcement by the state under (e) of this subsection is not liable for claims for contribution regarding matters addressed in the settlement.

(5)(a) In addition to the settlement authority provided under subsection (4) of this section, the attorney general may agree to a settlement with a person not currently liable for remedial action at a facility who proposes to purchase, redevelop, or reuse the facility, provided that:

(i) The settlement will yield substantial new resources to facilitate cleanup;

(ii) The settlement will expedite remedial action consistent with the rules adopted under this chapter; and

(iii) Based on available information, the department determines that the redevelopment or reuse of the facility is not likely to contribute to the existing release or threatened release, interfere with remedial

actions that may be needed at the site, or increase health risks to persons at or in the vicinity of the site.

(b) The legislature recognizes that the state does not have adequate resources to participate in all property transactions involving contaminated property. The primary purpose of this subsection (5) is to promote the cleanup and reuse of vacant or abandoned commercial or industrial contaminated property. The attorney general and the department may give priority to settlements that will provide a substantial public benefit, including, but not limited to the reuse of a vacant or abandoned manufacturing or industrial facility, or the development of a facility by a governmental entity to address an important public purpose.

(6) Nothing in this chapter affects or modifies in any way any person's right to seek or obtain relief under other statutes or under common law, including but not limited to damages for injury or loss resulting from a release or threatened release of a hazardous substance. No settlement by the department or remedial action ordered by a court or the department affects any person's right to obtain a remedy under common law or other statutes.

## CR 56(h)

(h) Form of Order. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

## EXCERPTS FROM THE RECORD (ER)

**ER 1**: Purchase and Sale Agreement: That Purchase and Sale agreement (to which the Trust was not a party), after clearly describing that Trust and Richard C. Foran as "Seller

Creditors" provided specifically §3(c)(2) that (Ex. 1 CP 179-350):

> "If within five (5) years of the Closing Date, Buyer discovers any construction debris or other material on the Marine View Property or the Marine View North Property which was not deposited pursuant to a valid permit, or any hazardous substances (as defined by any federal, state or local law) on the Marine View Inc., property or the Marine View North property which were not deposited on such property after Closing, then Buyer shall give notice to Seller and Seller Creditors of such discovery, which notice shall include a detailed estimate prepared by a qualified independent contractor qualified to contract with the Port of the costs to Buyer to remove such debris or other material or remediate such hazardous substances. Where practical, Buyer shall attempt to obtain a fixed bid for such removal, remediation or resolution."

§5 (c) provided:

> Buyer agrees to look solely to the Special Escrow under Section 3(c) of this Agreement for satisfaction of indemnity claims under this Section 5 (c). In addition, Seller's obligations under Section 5 (c) are limited to claims as to which Buyer has given written notice to Seller within five (5) years of Closing.

§5(d):

> (d) **Release of Sellers and Seller Creditors.** Buyer and its subsidiaries, officers, directors, managers, members, agents, affiliates, and their successors and assigns,

each agree that Sellers, their members, shareholders, managers, employees, agents, contractors and their successors and assigns, and the Seller Creditors, and their trustees, officers, shareholders, employees, agents, contractors and their successors and assigns (collectively, the .."Seller Released Parties"), are hereby released from any and all actions, suits, liabilities, damages, losses, costs, and claims which Buyer may now have or may hereafter have against the Seller Released Parties by reason of any matter relating to or arising from Sellers' or the Seller Creditors' ownership, operation or *use* of the Property; or the physical or environmental condition of the property; provided, however, that the foregoing release shall not. extend to, or provide a release from, any representations, warranties, covenants: indemnifications made by Sellers in this Agreement or in the documents to be delivered at Closing; and provided farther, that the foregoing release shall not limit or impair claims against the Special Escrow pursuant to Sections 3(c) and/or 5(c) of this Agreement. Buyer hereby agrees and acknowledges that factual matters now unknown to it may have given or may hereafter give rise to actions, suits, liabilities, damages, losses, costs, or claims, which are presently unknown unanticipated and unsuspected, and Buyer further agrees, represents and warrants that this Agreement has been negotiated and agreed upon in light of such acknowledgment and that, except *as* otherwise expressly provided in the preceding sentence, Buyer nevertheless hereby agrees

to release the Seller Released Parties as provided in this Section 5(d).

**ER 2**: Escrow Agreement Paragraph 10 (Ex. 2 CP 179-350):

> **Funds in Escrow**. Except as provided in Sections 3 and 4 above, the Escrow Funds shall be the property of the Trust. Accordingly, the Trust (and not the Escrow Agent) shall be obligated to pay any income taxes on the income of the funds held in Escrow. The Escrow Agent shall be obligated to issue or cause to be issued to the Trust all Forms 1099 and other forms reporting taxable income of the Escrow.

Escrow Agreement § 4 (Ex. 1 CP 179-350):

> If within five (5) years of the "Closing Date" under the Purchase Agreement, the Port discovers any construction debris or other material on the Property which was not deposited pursuant to a valid permit, or discovers any hazardous substances (as defined by any federal, state or local law) on the Property which was not deposited or released onto the Property after the Closing Date, and such materials or condition are not within the scope of the Negotiated Cleanup Obligations, the Port shall give notice to Marine View Inc. and the Trust (with a copy to Escrow Agent) of such discovery on the Property, which notice shall include a detailed estimate prepared by a qualified independent contractor qualified to contract with the Port of the cost to the Port to remove such debris or other material or remediate such hazardous substances. Where practical, the Port

shall attempt to obtain a fixed bid for such removal, remediation or resolution. After the Port furnishes the Trust and Marine View Inc., with notice of such discovery, Marine View, Inc. and the Trust shall each have a reasonable period of not less than 21 days with respect to hazardous substances, and 5 days with respect to debris or materials which are not hazardous substances, after receipt of notice from the Port (such 21- or 5- day periods to run concurrently) to comment upon the proposed remediation before work on said remediation shall commence, except in case of emergency threatening life or limb of persons on the Property or immediate destruction of the Property. (Emphasis added)

Escrow agreement §5 (c), the Port further agreed:

"Buyer agrees to look solely to the Special escrow in Section 3(c) of this agreement for satisfaction of (Environmental) indemnity claims under Section 5 (c). In addition, Seller's obligations under this Section 5(c) are limited to claims as to which Buyer has given notice to Seller within five (5) years after closing."

**ER 3**: Declaration of Liberty Waters filed January 23, 2012. Settlement Agreement, Exhibit 3,

7. Documentation. Prior to Closing, the Trust shall deliver to Escrow Agent for release at Closing such documentation reasonably required by Marine View, the Port, or Escrow Agent to evidence the full satisfaction of the Obligations,

including without limitation acknowledgement of full payment, forgiveness and satisfaction of the notes and deeds of trust described on Exhibit A. Payment in full of the notes described on Exhibit A shall be evidenced by tendering original counterparts of the Note, marked by the Trust as "paid in full", dated and signed by the Trust, together with a request for full reconveyance of the deeds of trust to the trustee thereunder. The Trust shall also execute and deliver any other documentation and information reasonably required by Marine View, the Port, or the Escrow Agent to confirmsatisfaction of the Obligations, including confirmation of the release set forth in Section 7 below. If the original notes and deeds of trust are not available. the Trust shall execute and deliver such documentation and information reasonably required by the Title Company to evidence the satisfaction of the notes and deeds of trust.

8. Release of Obligations. The Trust and Marine View acknowledge that the Trust has agreed to accept the Payoff Amount in full satisfaction of all Obligations of Marine View, Operator, Parsons, and Books (collectively, the "Marine **View Parties")** in connection with the Obligations, except for (a) any claims made by the Port for removal of any construction debris or other material on the Property which was not deposited pursuant to a valid pelinit and which was deposited or released onto the Property between January 25, 1996 and the Closing Date, or (b) any hazardous substances (as defined by any federal, state or local

law) on the Property which were deposited or released onto the Property between January 25, 1996 and the Closing Date, and upon Closing and payment of the Payoff Amount to the Trust and Escrow Agent in accordance with the terms of this Agreement, the Marine View Parties shall hereby be released from and against any loss, cost, liability, expense, claim or damage arising from or relating to the Obligations, except to the extent of the obligations of Marine View under the Escrow Agreement or as reserved immediately above.

Declaration of Liberty Waters January 23, 2012: Environmental Chemical Solutions report dated May 25, 2006, Exhibit 2:

**CONCLUSIONS AND RECOMMENDATIONS**

1. **REVIEW OF PAST ANALYSES SHOWED ONLY ONE AREA WITH OIL LEVELS HIGHER THAN MTCA LIMITS**
2. **CONTAMINATED SOIL WAS EXCAVATED AND MOVED TO A REMEDIATION SITE ON PROPERTY**
3. **EXCAVATION PITS WERE TESTED AND FOUND TO BE WELL BELOW MTCA LIMITS**
4. **CONTAMINATED SOIL WAS REMEDIATED AND RESULTING TESTS SHOWED VERY LOW OIL LEVELS, WELL BELOW MTCA LIMITS**
5. **SPECTRA LAB PERSONNEL REPORTED THAT THE PRESENCE OF ASPHALT IN SAMPLES WILL TEST OUT AS OIL AND DIESEL**
6. **NO FURTHER ACTION IS RECOMMENDED**

Declaration of Liberty Waters, filed January 23, 2012, Exhibit 5 demand letter dated May 23 2011

and enclosed with the demand letter addressed o the Trust on May 26, 2011, exhibit 5 page 2 footnote 1.

Although the Port remediated multiple other forms of debris and hazardous substances in 2010 at a total cost of more than $5 million, the Port is detailing only the costs attributable to the metals contamination here because those costs alone exceed the $500,000 in the escrow agreement.

**ER 4**: Port's Motion for Summary Judgment, filed June 15, 2012, Page 4 note 5:

"The Trust is an admitted successor in interest to Camille F. Fjetland and B & L Trucking and Construction, Inc., the prior owners of he property who sold the property to Marine View, Inc., which in turn sold te Property to thePort. Decl. ¶ 3 Ex. 2 pl(12). Thus both the Trust and its beneficiary would face liability under the Model Toxics Conrol Act (RCW 70,105, *et seq.*) (MTCA) for their full sare of almost $3 million spent on environmental remediation absent releases contained in the escrow agreement

**ER 5**: Leslee Conner Declaration of June 15, 2012,

Page 7 paragraph 14 (CP 867, 860-922):

Port Failed to Provide Remediation 21-day Notice to Trust. The Trust has correctly asserted that the Port failed to provide the Trust with 21-day prior notice of the remediation, which would have allowed the Trust an opportunity to comment on the planned remediation. That failure was the result of an unintentional human error. For unknown reasons, the Port's files did not contain a copy of the Trusts's Escrow Agreement, which is the only place the 21day notice is identified. The omission was compounded by prior departures of Port staff that had managed the purchase of the property.

.....

§ 17. .... Also as a result of pre-purchase sampling, various metals including arsenic were detected in several soil samples from the property. A single sample out of the 27 pre-purchase samples analyzed for metals was reported to have a concentration of one metal (arsenic) above MTCA cleanup levels. That single result, less than two times the MTCA cleanup level, would not have supported a requirement under MTCA for cleanup.

Exhibit 7 Washington State Department of Ecology Port of Tacoma AGREED ORDER No. DE 8400:

V. FINDINGS OF FACT

Ecology makes the following findings of fact, without any express or implied admissions of such facts by Port of Tacoma:

7.

The Port of Tacoma is the current property owner of Tax Parcel 0421313048 in Pierce County, Washington. This parcel, together with other locations where contamination from this parcel has come to be located, comprise the Site.

8.

Prior to the 1950s, the Site was essentially undeveloped land, comprised of approximately 9 acres of lowlands adjacent to Hylebos Creek, a tributary to Commencement Bay, and approximately 18 acres of steep-sloped hillsides leading to high bluffs. From the 1950s through 2006, the Site was used as a sand and gravel mine and an inert solid waste recycling facility. In addition, during that time, a significant volume of material (soil, concrete, asphalt, and metal wastes) was placed as fill at the site. In the lower portion of the Site, the fill raised the surface elevation approximately 10-15 feet.

a. The Port of Tacoma purchased the parcel in 2006 from Marine View Inc. and Marine View North, LLC. Between the time of the Port of Tacoma's purchase in 2006 and 2010, the Site

was used only occasionally, as a temporary equipment staging site. In 2010, the Port of Tacoma stabilized several post-mining steep slopes and developed the lower portion of the Site as intertidal and uplands wildlife habitat.

9.Pre-purchase environmental investigations completed for the Port of Tacoma in closure, certain cleanup actions were completed by the seller; these included removing an estimated 4,000 tons of waste wood, glass, and window frames, an estimated 30,000 cubic yards of debris (primarily concrete and asphalt), and excavation and on-site treatment using enhanced biodegradation of approximately 25 cubic yards of petroleum-contaminated near-surface soil.

9. In 2006, Ecology started an Initial Investigation of the Site under MTCA and issued an Early Notice Letter to the Port. in August 2007. A Site Hazard Assessment was completed for Ecology by the Tacoma-Pierce County Health Department in July 2008; the resulting site ranking was 3.

10. In 2009 the Port contracted additional environmental investigations of soil and groundwater in the lower portion of the Site. Those investigations confirmed the 2005 investigation results of contamination in soil and identified a significant volume of concrete, metal waste, and wood waste in the subsurface and petroleum and metals contamination in groundwater.

11. In 2010, the Port initiated redevelopment of the property, which included an independent remedial action for soil and groundwater at the Site. The remedial action included excavation and offsite disposal of approximately 254,500 tons of fill from the Site and removal of an abandoned underground storage tank (UST).

12. Soil and groundwater contamination at the Site has been documented by the following reports:

1. *Phase I and Phase II Environmental Site Assessment and Fill Material Evaluation,* GeoEngineers, Inc., May 27, 2005.

2. *Parcel 88 Combined Habitat Mitigation Project Environmental Assessment Report,* Hart Crowser, April 2010

I. Ecology hereby incorporates into this Order the previous remedial actions conducted by Port of Tacoma as described in this section. Reimbursement eligibility for specific project tasks under a grant agreement with Ecology is contingent upon the determination by Ecology's Toxic Cleanup Program that the work performed complies with the substantive requirements of Chapter 173-340 WAC and is consistent with the remedial action required under this Order.

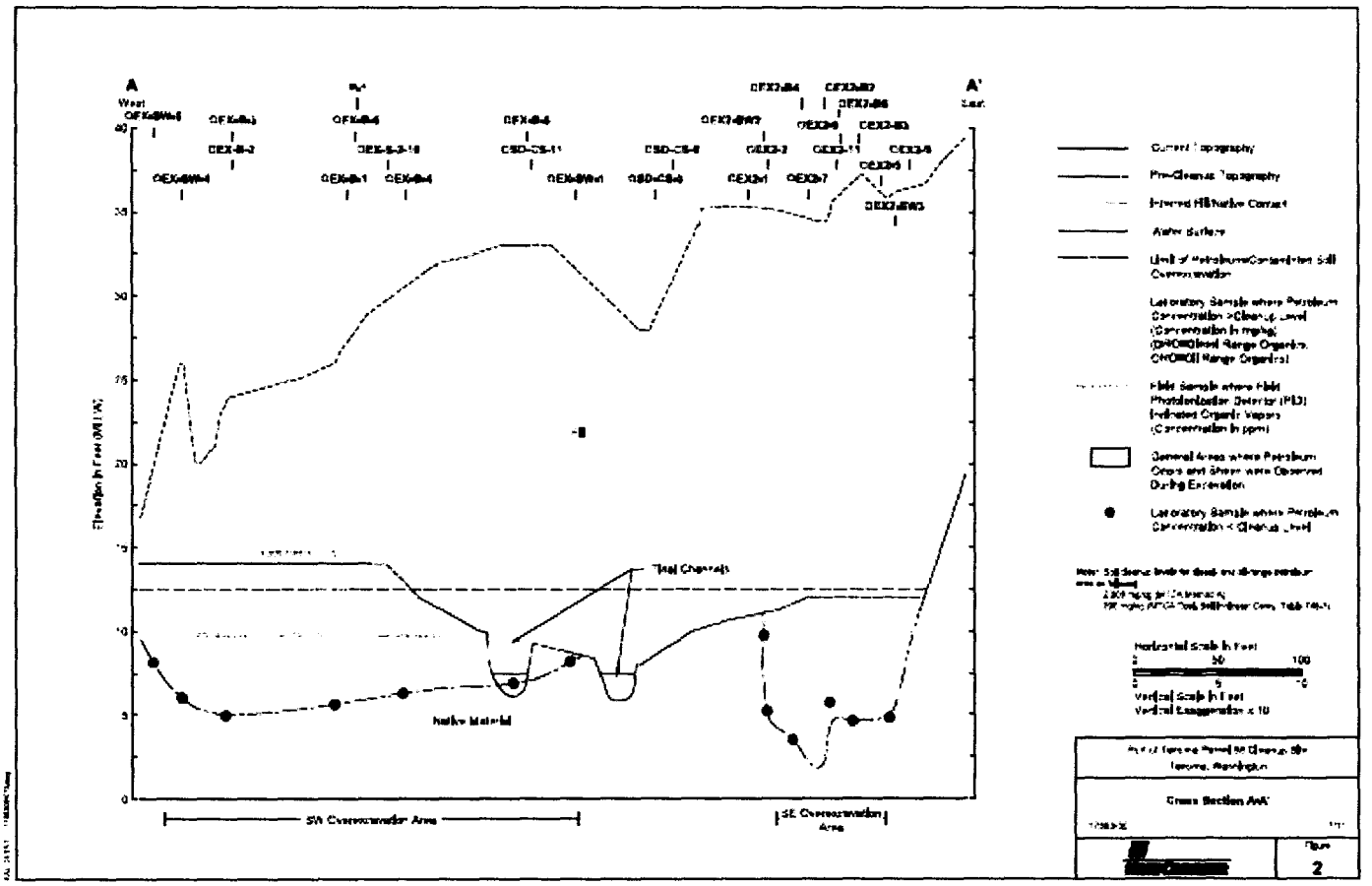
This report may have been Attachment 1, Hart Crowser 2010 Cleanup Completion Report, Port of Tacoma Parcel 88, 1621 MarineView Drive, Tacoma, Washington, June 24, 2011 which we located previosly at the Superior Court Clerk's office but cannot not now find in the lo line documents.

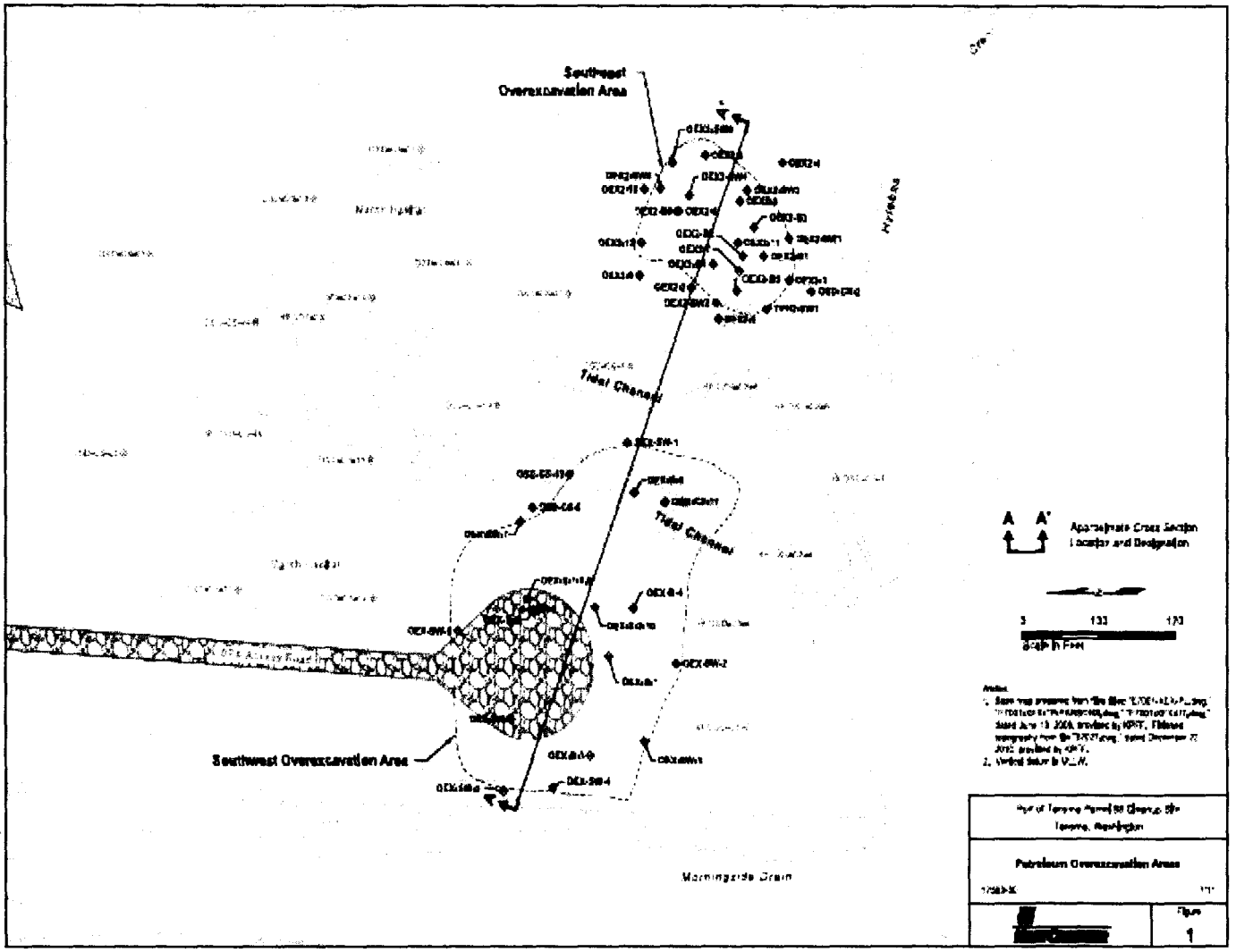
4.1.2.1 Soil. Impacted soils were found to be scattered throughout the fill, with no clear pattern of occurrence that could be correlated vertically or laterally to the lithologies, specific debris, or known areas of historical operations.

**ER 6**: Declaration of Mark Dugel, senior Associate Hydrologist fir Hart Crowser, filed June 15, 2012, § 6 stated:

"Petroleum contamination predates 2006. The petroleum contamination found in the two ovrexcavation areas was emplaced prior to significant filing of the site, which, based on historical photographs, occurred long before the port's purchase of the property in 2006. This

is based on the fact the petroleum contamination in the two overexcavation areas was found well below the elevation of the water table that had developed withn the fill area. Because petroleum products float on water, contaminated soil and heavy sheen would not occur very far below the water table. Therefore, any releases of petroleum that might have occured after the fill layer was in existence would not have caused the contamination found in the two overexcavation areas."


A
A'
Native Material
Tidal Channels
SW Overexcavation Area
SE Overexcavation Area
Figure
2


Southwest
Overexcavation Area
Tidal Channel
Tidal Channel
Southwest Overexcavation Area
Morningside Drain
A A'
Approximate Cross Section
Location and Designation
Petroleum Overexcavation Areas
Figure
1

§ 7 Declaration of Mark Dagel Filed Jun e 15, 2012:

(§7 p 7) "For example, soil samples from the overexcavation areas collected by Hart Crowser on July 21, August 16, October 2, October 3, and October 5, 2010 found petroleum concentrations that ranged from 230 mg/kg to 2,700 mg/kg (ORO). A number of these samples exceed the soil cleanup criteria established for protection of groundwater quality based on residual saturation of 2,000 mg/kg (WAC 173-340, Method A soil cleanup level for unrestricted land uses) and for protection of terrestrial organisms of 300 mg/kg (based on soil indicator concentrations shown in WAC 173-340-900, Table 749-3). These exceedances indicated that the site required cleanup in order to protect human health and the environment in accordance with MTCA."

The Dagel report states that his opinion is based upon the following (§ 2):

- Parcel 88 Combined Habitat Mitigation Project Environmental Assessment Report (April 2, 2012), 1128 pages.

- Independent Remedial Action Report Port of Tacoma Parcel 88 (June 24, 2011), 1115 pages.

- Draft Remedial Investigation/Feasibility Study Port of Tacoma Parcel 88 (June 24, 2011), 46 pages.

Unfortunately - Draft Remedial Investigation/Feasibility Study Port of Tacoma Parcel 88 (June 24, 2011), 46 pages., which includes the Hart Crowser report of the same date was not

apparently attached to the Dagel Declaration when we attempted to download it from the Pierce County files while drafting this, but it was observed earlier in the court files presented by the Port and stated of particular importance with regard to petroleum contamination:

> 4.1.2.1 Soil. Impacted soils were found to be scattered throuhout the fill, with no clear pattern of occurrence that could be correlated vertically or horizontally to the lithologies, specific debris, or known areas or historical operations.

This may have been a part of Appendix C, 2010 Cleanup Completion Report, Port of Tacoma, Parcel 88, Marine View Drive, Tacoma, Washington, prepared for Port of Tacoma, June 24, 2011 17562-00 Hart Crowser. We thus move to supplement this portion of the ER and Record on Appeal, if now actually missing, to include such exerpts from that report when found in the current or corrected record as further response to the Dagel declaration supra, to wit:

§ 6 Petroleum contamination predates 2006.

> The petroleum contamination found in the two overexcavation areas was emplaced prior to significant filling of the site, which, based on historical aerial photographs, occurred long before the Port's purchase of the property in 2006. This is based on the fact the petroleum contamination in the two overexcavation areas was found well below the elevation of the water table that had developed within the fill layer. Because petroleum products float on water, contaminated soil and heavy sheen would not occur very far below the water table. Therefore, any releases of petroleum that might have occurred after the fill layer was in existence would not have caused the contamination found in the two overexcavation areas.

that is directly contradicted by the statement in the Hart Crowser report of June 24, 2011, attached including graphics showing petroleum congtamination well above the mean water level and that the water level would be effected by the tides[1] which he did not take into consideration. The declaration of Leslee Conners filed June 15, 2014, in support of a summary judgment on, Exhibit 5, Contains a later report from Hart Crowser of June 27, 2011 does not contain this information and is a much truncated report compared to that of June 24, 2011. One or two of the Court files appeared to be corrupted when I later tried to download them over the internet.

**ER 8**: Campbell Declaration filed June 29, 2012 (CP 396 - 407):

1. Annexed hereto as **Exhibit 1** and incorporated herein as though fully set forth herein, are true copies of a map and portions of that map from the business records of B & L Trucking and Construction Company showing where that company delivered, presumably between 1974 and 1991, pit run gravel, wood waste and Asarco slag products in and around Tacoma in Pierce County and around the Port of Tacoma. It is incorporated herein as though fully set forth herein and is from the surviving business records of B & L Trucking and Construction Co., Inc. The PDF copies may be enlarged for easier reading. The original idnetifications are entered on an approximate 4 foot by 4 foot Metsker's Reference Map of Tacoma, Washington dated 1974 with entries made presumably on and after that date until the death of William Fjetland in about 1991. Asarco slag deposits are shown in Grey, wood bark deposits in red and B & L Trucking & Construction co and Foran gravel pit deposits in Green. We can easily furnish digital copies of the photographs of the map that can be clearly blown up to full size or larger

---

1

According to NOAA this may vary at least four feet from high to low http://www.pmel.noaa.gov/pubs/PDF/mofj2533/mofj2533.pdf (Figure 5.2) and who knows howv much between winter rains when the ground is soaked and summer droughts.

or the map itself if requested for hearing. The infamous B & L Superfund site (not part of the Marine View Property bought by the Port of Tacoma) is shown on the map closer to Milton and can be seen going north on I 5 just past Fife on the right as a mound in the distance. It covers about 20 acres.

2. The Purchase and Sale Agreement (PSA) describes other properties in the neighborhood and some belonging to the Port as the Commencement Bay/Nearshore Tideflats Superfund Site. Public Records of that area and work thereon are published on the Web at **COMMENCEMENT BAY, NEARSHORE/TIDEFLATS** - WASHINGTON - EPA ID# WAD980726368, Update May 2010, see: http://yosemite.epa.gov/r10/nplpad.nsf/0/06e1c0cda0d11fc285256594007559fd!OpenDocument. That public record is incorporated herein by reference as through fully set forth herein and a copy of that report is attached as **Exhibit 2.** It would appear that many of the properties listed on the Metsker map may not be listed on the government site as being cleaned up or subject to clean up. Perhaps they posed no hazardous waste or metals contaminant problem, though they certainly seen to have contained much more Asarco slag per acre than any claimed to be found on the 9 acres in the Marine View property by Hart Crowser. Some of the principal properties shown on the Metsker map appear to be:

Blair Waterway

EBI Terminal

Washington United Terminal

The Logs and Auto Facility adjacent to and northerly of the Pierce County Terminal, Port of Tacoma Access Road.

Fully half or more of the Sitcum Waterway

APM Terminal

Public Observation Tower Port Administration Office

Hylebos Waterway

Carlile Transportation

North Container and/or Food Protection Services Calsag (???) Metals

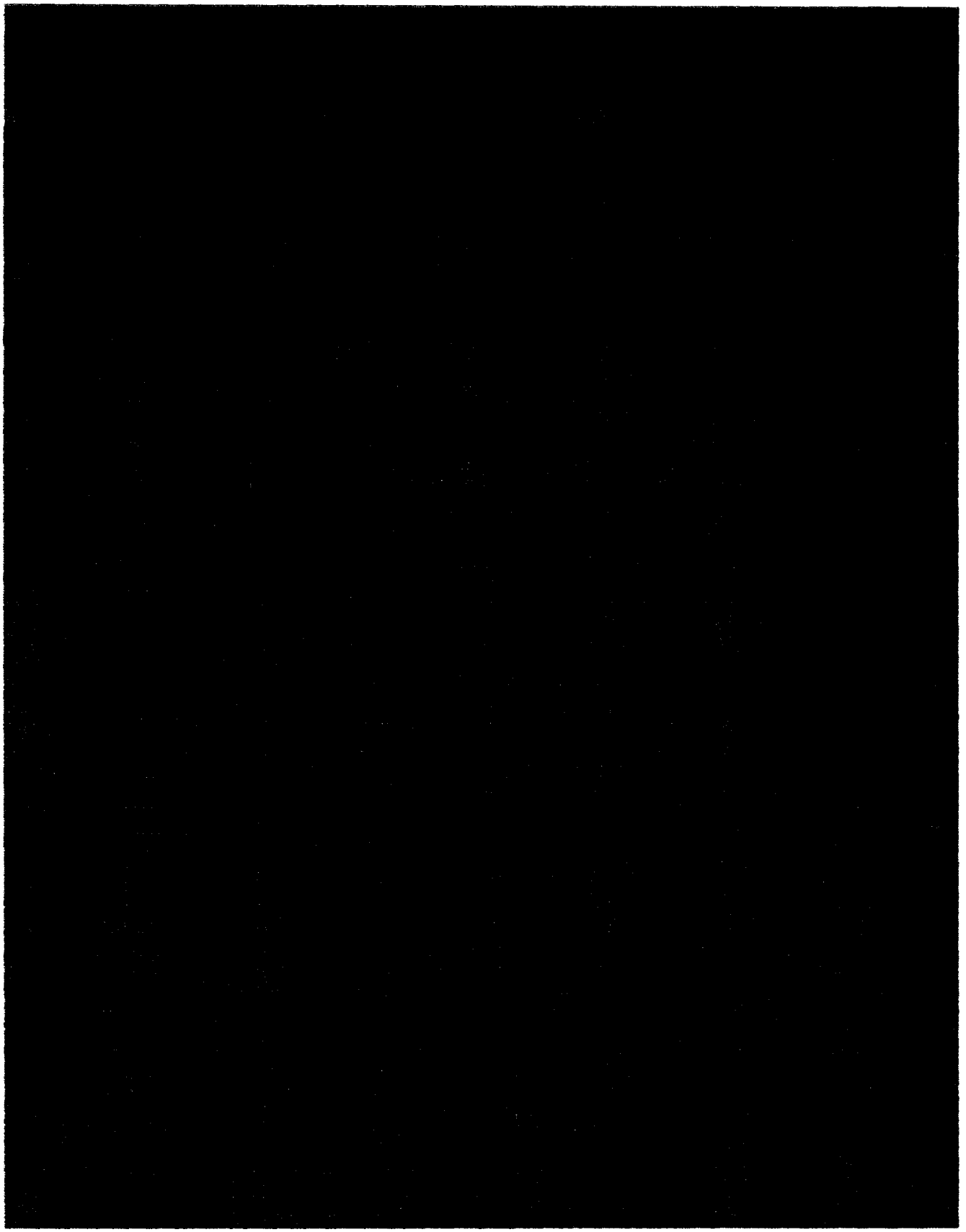
Northwest Container Services

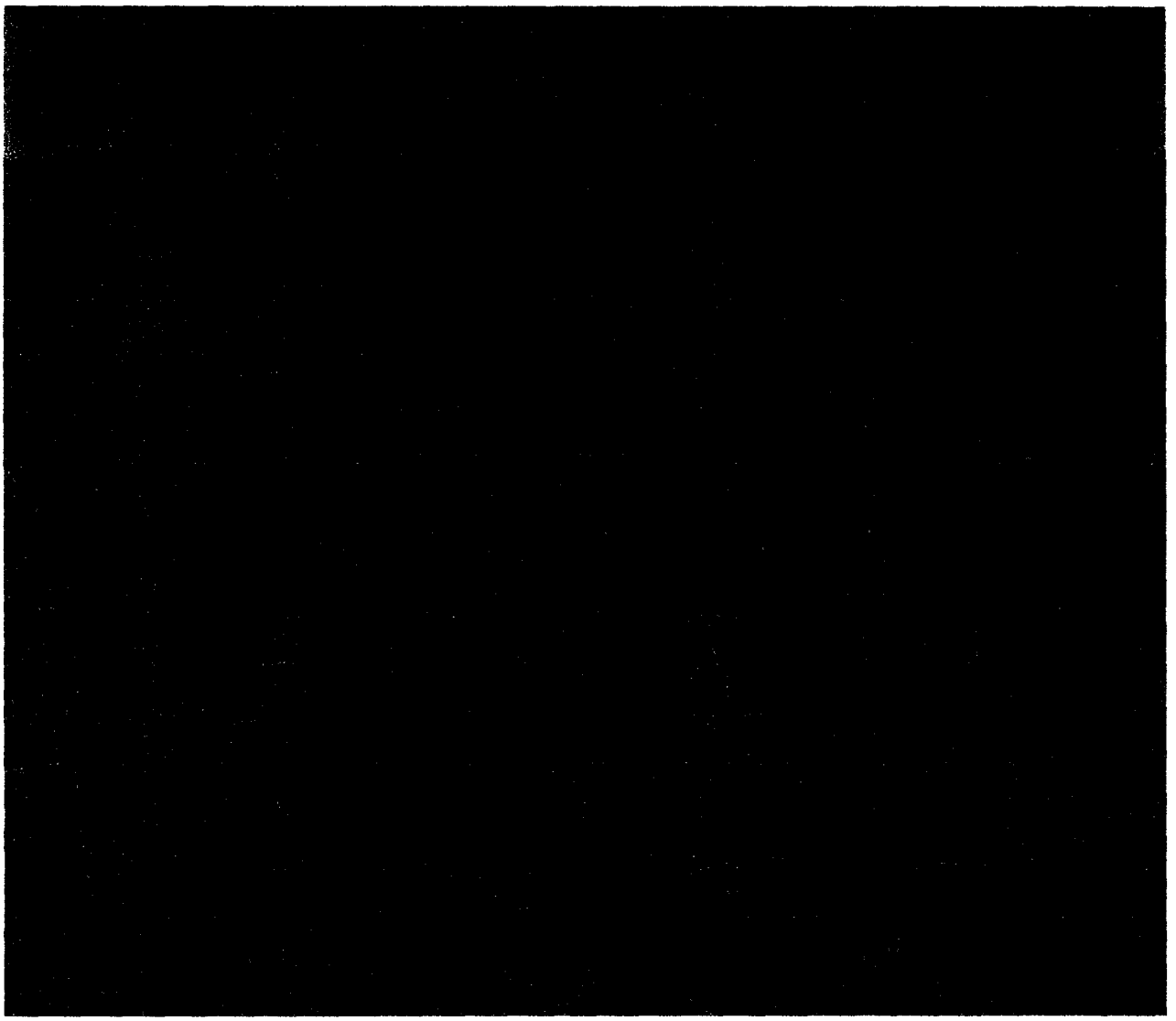
Quigg Brothers

Food Protection Services

3. Attached hereto as **Exhibit 3** and incorporated herein as though fully set forth herein is a copy of a0 map furnished to me as illustrating the location of Port owned or operated properties in the tide flat areas of the Port of Tacoma. The PDF file copy may be enlarged several times to provide more accurate readings.

1.





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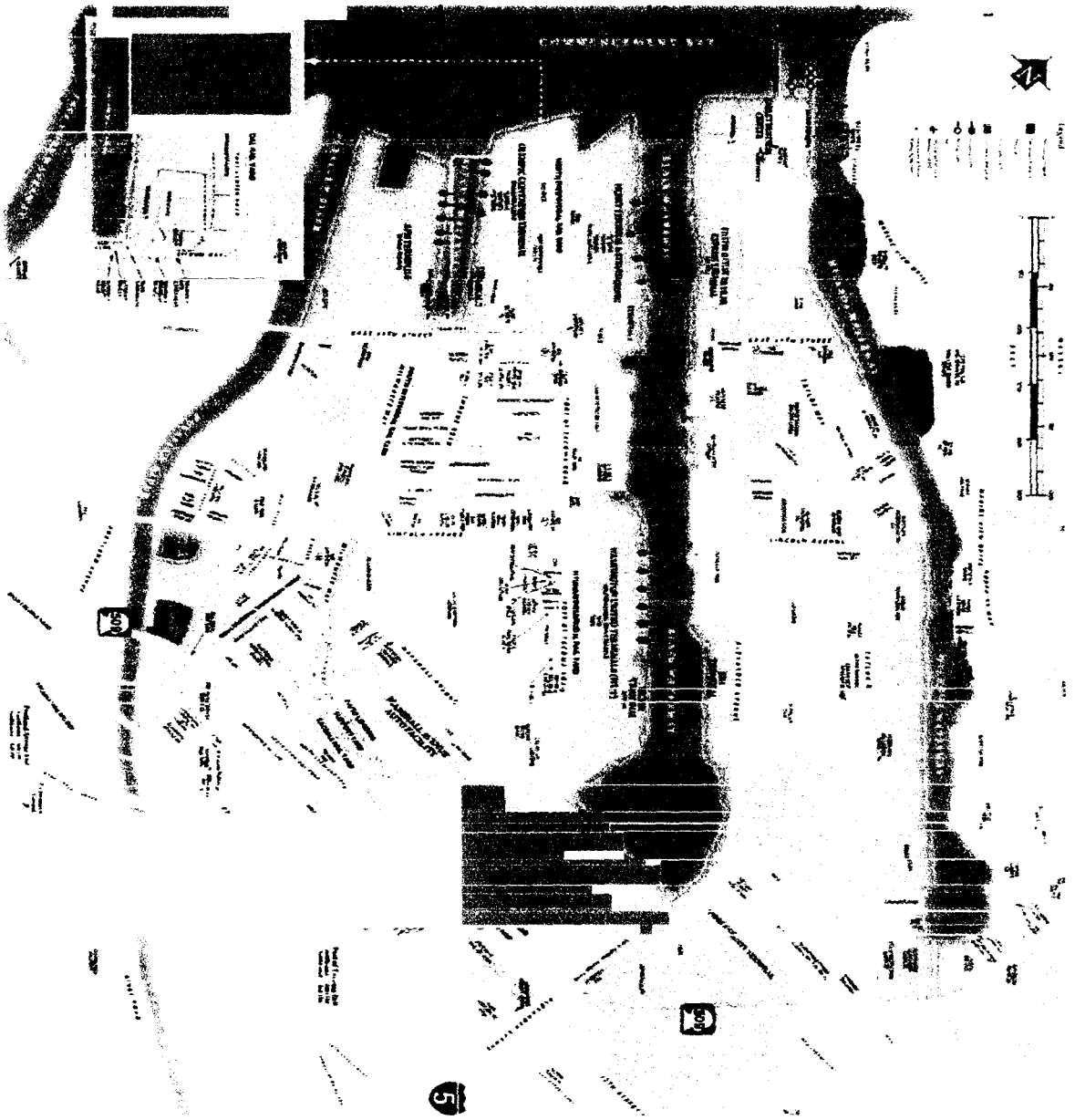

# Edward D. Campbell

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Phone (206) 783 3410
or (206) 914 8267

September 29, 2014

Mr. David Ponzoha, Clerk/Administrator
Court of Appeals, Division 2
950 Broadway, Suite 300
Tacoma, WA 98402



Mr. Mark S. Nadler, P.E.
The Nadler Law Group
720 3rd Ave . Ste 1400
Seattle, WA 98104

Re: **C.P.B. & L Trust v. Port of Tacoma # 439409**
Appellants Motions to Reconsider and to Publish and Declaration of Service by Mail.

Dear Court of Appeals and Mark S. Nadler:

Enclose for filing and for Mr. Nadler a true and exact copy of the Motion for Discrretionary Review of Appellant. I declare under pains and penalties of perjury that on this date I did deposit said true and exact copies of said Motion to Mr. Nadler, Attorney for Respondent. at the address listed above, with proper first class or priority postage prepaid..

Very truly yours,

Edward D. Campbell, WSBA #439

Enclosure: Motion for Discretionary Review

EDC:edc