

No. 44925-1-II

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

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VIKING BANK, Respondent,

v.

FIRGROVE COMMONS 3, LLC, Appellant.

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**BRIEF OF RESPONDENT**

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## **INTRODUCTION:**

This case involves interpretation of a lease – a long-term, 45-page, fully-integrated commercial ground lease to be specific.

The ground lease called for the tenant – a bank – to build, operate, and manage its own bank branch on the land. The bank fulfilled this obligation.

The lease set forth a precise amount of rent to be paid by the bank. The bank fulfilled this obligation as well.

Eight months into the lease, a third-party purporting to represent the landlord sent an invoice to the bank, claiming additional “backcharges” were owed. The third party claimed the amount was due as “management fees.” The “fees” initially were billed at 5% of the rent. According to the third-party management company, the amount charged to the bank was owed because it was “standard in the industry.” The company later increased the amount.

The bank refused to pay the additional charges.

About 18 months into the lease, the landlord’s attorney issued a formal 10-day notice to the bank, demanding that the bank either pay

the additional charges or forfeit its rights under the long-term ground lease.

The bank started a declaratory judgment action in Pierce County Superior Court to adjudicate the parties' legal rights under the ground lease. The landlord counterclaimed for breach of the lease.

Following a one-day trial, the Honorable Stephanie A. Arend of the Superior Court ruled that the landlord had failed to meet its burden of proving that the bank had breached the lease. The trial court reasoned, in part, that the lease contained specific terms and conditions regarding the tenant's financial obligations, including precise dollar amounts for rent and exact percentage amounts to be paid for common area expenses, which the bank had fully paid.

The court concluded that the landlord's attempt to impose a "management fee" based on a percentage of the rent, to then be added to the tenant's rent obligation under the lease, was not part of the parties' contract.

The trial court declared that the bank was not in breach of the ground lease, and that the bank's leasehold rights had not been terminated. The landlord appealed.

The trial court's decision should be affirmed.

The trial court's findings are supported by the evidence, and the court's conclusions are well-supported by solid precedence. There was no error.

## **STATEMENT OF THE CASE**

### **GENERAL BACKGROUND**

Viking Bank was looking to add another branch for its banking operations. The Bank had built or purchased seven branch buildings and wanted to add one to serve the Puyallup market area.

The Bank negotiated a 40-year<sup>1</sup> ground lease for a vacant corner building lot in Puyallup. The lot owner was a company named Firgrove Commons 3, LLC ("the Landlord"). The lease included an option for the Bank to purchase the land.

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<sup>1</sup> The initial term is 20 years, followed by 4 five-year extension options.

The ground lease was a fully integrated contract. Both parties agree on this point, and the trial court so found. [CP 56; Finding 5.]

**KEY TERMS OF THE PARTIES' 40-YEAR GROUND LEASE**

According to the terms of the Lease, the Bank had to construct, manage, and operate a single-purpose, 'stand alone' retail banking facility on the lot:

A. Landlord is the fee owner of that certain unimproved real property located in Pierce County in the State of Washington, legally described in Exhibit "A" ("Ground Leased Premises") attached hereto and incorporated herein by this reference.

B. Landlord desires to lease to Tenant the Ground Leased Premises and Tenant desires to lease the Ground Leased Premises from Landlord in order for Tenant to cause thereon the construction, management, and operation of a retail banking facility, consisting of a building containing not more than 3,500 square feet of interior area ("Facility") together with parking and three drive-through lanes, approximately 32,665 square feet of land, as more particularly depicted on the site plan as Exhibit "B" ("Site Plan") attached hereto and made a part hereof, and as shown on the site plan of that certain shopping center commonly known as ("**Firgrove Commons**," or "**Firgrove Commons Shopping Center**"), together with (a) all rights, easements and appurtenances belonging or appertaining thereto, including utility easements, (b) all right, title and interest of Landlord in and to any and all roads, streets, alleys and ways bounding such property and (c) all buildings and other improvements thereon, if any (collectively, "**the Property**" or "**the Ground Leased Premises**").

[Exhibit 1: Recital B, page 5].

The only mention of "management" in the ground lease is the provision noted above, which reflects that the Bank – not the Landlord or some third party – is going to manage the Property/Ground Leased Premises.

Under the lease, the Bank was fully responsible for maintaining the building, as well as the land, at its own cost and expense:

Section 7.1. Maintenance of Ground Leased Premises. Tenant agrees that it will, at its own cost and expense, maintain or cause to be maintained the Ground Leased Premises, Facility, and any other improvements, landscaping, and paved areas thereon and appurtenances thereto and every part thereof, in good order, condition, and repair and in accordance with all applicable laws, rules, ordinances, orders, and regulations of all governmental authorities. Such maintenance shall also be in accordance with reasonable rules and regulations imposed by Landlord as are needed in its reasonable discretion to ensure that the Facility is aesthetically harmonious with the improvements located on the Center Property. In the event any repairs or maintenance required to be made under the provisions of this

The lease spelled out exactly the Bank's obligations to pay rent to the Landlord for the land:

Tenant agrees to pay Landlord, without notice, demand, abatement, deduction, or offset, for the use and occupancy of the Ground Leased Premises, Base Annual Rent in the amount of One Hundred Fifteen Thousand Dollars (\$115,000.00), payable in monthly installments in advance on the first day of each and every month during the Term, in the sum of Nine Thousand Five Hundred Eighty Three and 33/100 Dollars (\$9,583.33). The first month's rent shall be paid upon lease execution and be credited on the Rent Commencement Date. In the event that the Rent Commencement Date falls on a day other than the first day of a calendar month, the rent for the first and last months of the Lease shall be prorated. The Base Annual Rent shall be subject to the following escalation schedule:

Initial Lease Term:

Years 1 – 5; Initial Base Annual Rent,

Years 6 – 10; Base Annual Rent increased to One Hundred Ten Percent (110%), of the previous years Base Annual Rent

Years 11 – 15; Base Annual Rent increased to One Hundred Ten Percent (110%), of the previous years Base Annual Rent,

Years 16 – 20; Base Annual Rent increased to One Hundred Ten Percent (110%), of the previous years Base Annual Rent

[Exhibit 1: Section 3.1 on page 8]. The lease also provides how rent would be computed for any renewal options under the lease. [*Id.*]

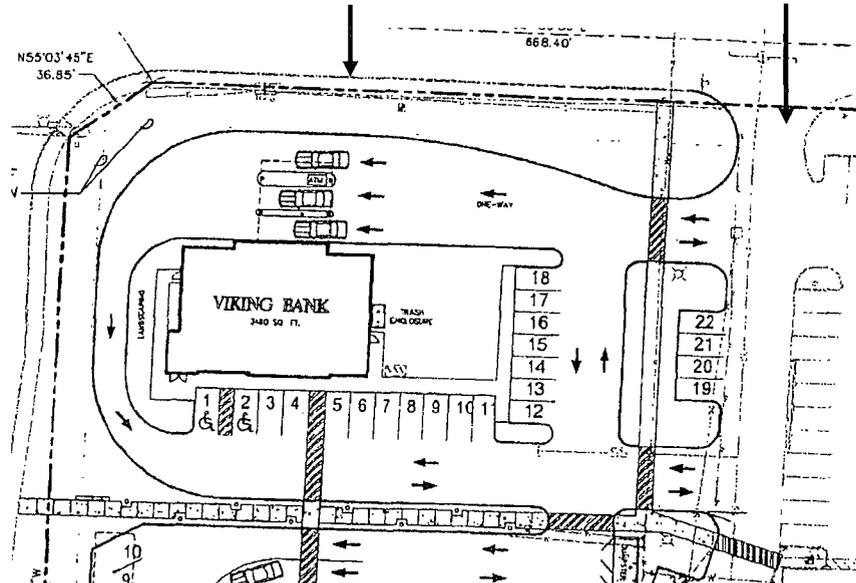
The Bank was solely responsible for paying real estate taxes and assessments on the land and the building, for all personal property taxes [Exhibit 1, Section 3.2], and for all utilities [Section 3.3].

The Bank also was obligated, at its own cost and expense, to obtain and maintain insurance coverage for the building and the land. [Section 11]

As designed, the Bank's new bank branch in Puyallup was going to have its own separate parking lot, but it would share paved driveways to and from public streets with two other buildings in the Firgrove shopping center. These other buildings were owned by third parties.

The location of the bank branch relative to these shared driveways and sidewalks was reflected in exhibits to the lease, such as

Exhibit B: "sidewalk" One of the "shared entryways"



Section 3.4 of the ground lease addressed the Bank's financial responsibilities regarding the cost and expense of maintaining or repairing these shared vehicle entrances and sidewalks:

Section 3.4. Common Area Maintenance Expenses.

Section 3.4.1. Definitions. For all purposes of this Lease, the following terms shall have the meanings ascribed to them herein.

(A) "CAM Expenses" shall mean the reasonable costs and expenses of maintaining or repairing any entrances to or sidewalks within Firgrove Shopping Center. CAM Expenses shall not include the cost or expense of snow removal, landscaping, or other work done on or around the Facility or Ground Leased Premises, which the Tenant shall be responsible for.

(B) "Tenant's Share" shall mean that certain portion of the CAM Expenses that Tenant is obligated to pay to Landlord, which shall be calculated by multiplying annual CAM Expenses, as defined above, by a fraction, the numerator of which shall be the total square footage of the Property, and the denominator of which shall be the total developed square footage of the property in Firgrove Commons Shopping Center, (see Exhibit B of the Firgrove Commons Condominium Declaration), which fraction Landlord and Tenant acknowledge and agree is equal to 25.50% (to be revised at such time as the Construction starts on improvements to Unit 4 of the Condominium).. However, if any CAM Expenses are included as part of any HOA dues, or vice-versa, then the Tenant shall be obligated to pay one or the other, but not both.

[Exhibit 1, page 10].

**LEASE COMMENCES; RENT IS PAID AND ACCEPTED**

Upon completion of its new branch facility in March of 2010, the Bank moved in, opened for business, and began dutifully making rent payments to the Landlord, as called for in the lease.<sup>2</sup>

The rent payments were accepted without objection or complaint.

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<sup>2</sup> Later in the relationship, the parties arranged for rent payments to be directly deposited to the Landlord's bank account, via automatic bank transfers. [RP 52:1-15]

**THIRD PARTY "BACKCHARGES" TENANT FOR "MANAGEMENT FEES"**

In November of 2010, an entity purporting to represent the Landlord as a management company sent the Bank the following invoice:

Make checks payable to:  
Firgrove Commons 3, LLC  
2727 Hollycroft, Suite 410  
Gig Harbor, WA 98335

Statement for:  
Viking Bank  
PO Box 19087  
4 Nickerson Street, Suite 200  
Seattle, WA 98109

Statement date  
11-30-2010

<u>Unit</u>	<u>Due Date</u>	<u>Description</u>	<u>Amount</u>
110	08-18-2010	Management Fee - CAM Backchrg	2,644.53
110	11-01-2010	CAM Charge	479.17
110	11-01-2010	Rent Charge	958.34
110	12-01-2010	CAM Charge	479.17
Balance:			<u><u>4,561.21</u></u>

[Exhibit 3]

The Bank objected to paying any amounts other than what had been negotiated and what was called for in the ground lease.

As was later determined, the "Management Fee/CAM Charge/Rent Charge" listed on the invoice was not based on the cost or expenses of maintaining or repairing the driveway entrances or

sidewalks. Rather, the charges were computed at 5% of the Bank's rent.

Testimony at trial indicated that "Unit 110" referenced on the invoice did not relate to the ground lease premises, but probably was a reference to some space in another building that the Bank had temporarily occupied while the Bank was building its 'stand alone' branch facility. [RP 25:2-8]<sup>3</sup>

**TENANT PAYS ALL CAM EXPENSES, BUT REFUSES TO PAY  
"MANAGEMENT FEES"**

At one point, the Bank was charged for CAM Expenses – specifically, de-icing the shared driveways and sidewalks. The Bank was charged labor rates of between \$47.50 and \$70.00 per hour for the de-icing work; de-icing materials were marked up 12% over cost. [See Exhibit 7].

The Bank paid its 25.50% share in full, as called for in the lease.<sup>4</sup> [Findings 20; *see* Finding 18; RP 52:21-25; 53:1-3]

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<sup>3</sup> The following nomenclature will be used for references to the Report of Proceedings: page number:starting line number-ending line number.

<sup>4</sup> The Bank reserved the right to later object to such high labor rates or markups. [See Exhibit 8].

**LANDLORD THREATENS EVICTION OF TENANT AND  
TERMINATION OF GROUND LEASE FOR NON-PAYMENT OF  
“MANAGEMENT FEES”**

The Bank continued to pay the rent and fulfill its other lease obligations, but held firm in its refusal to pay the additional 5%.

Later, the management company, or landlord, or both, retained an attorney to pursue the matter further. That attorney claimed that the additional money was “based on standard management agreements.”<sup>5</sup> The attorney argued that the Bank’s objections based on the express terms of the ground lease were merely “semantics.” [Exhibit 6]

The attorney issued the following 10-Day Notice to Pay Rent or Vacate, which demanded that the Bank either pay the additional money or move out:

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<sup>5</sup> The Bank has never been provided a copy of any such management agreement or contract. [RP 35:18-21]. The Landlord never offered any management agreement or contract into evidence at trial. [See Finding No. 6]

**COMMERCIAL TEN-DAY NOTICE TO PAY RENT OR VACATE PREMISES**

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TO: Viking Bank 4 Nickerson Street, Suite 200 Seattle, WA 98109	Viking Bank c/o Mr. Gary Krohn, Esq. 9725 - 3 <sup>rd</sup> Avenue N.E., Suite 600 Seattle, WA 98115-2060
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**YOU AND EACH OF YOU** are hereby notified, pursuant to RCW 59.12.030, RCW 59.12.040, and the Ground Lease (as hereafter defined) that as of this date you are in default of the Ground Lease heretofore entered into by you and Firgrove Commons 3, LLC, a Washington state limited liability company, the Landlord, on or about July 28, 2008, for the lease of that certain real property commonly known as Unit 3 of Firgrove Commons, a Master Condominium situated in the County of Pierce (hereinafter the "Ground Lease"). Said default is for non-payment of monetary obligations as follows:

CAM Back Charges	\$2,644.53
November 2010 CAM Charge	\$ 479.17
CAM Back Charges	\$ 958.34
December 2010 CAM Charge	\$ 479.17
January 2011 CAM Charge	\$ 479.17
February 2011 CAM Charge	\$ 479.17
March 2011 CAM Charge	\$ 479.17
2010 CAM Back Charge	\$ 70.92
2011 CAM Increase (Jan.-April)	\$ 547.32
April 2011 CAM Charge	\$ 479.17
May 2011 CAM Charge	\$ 616.00
June 2011 CAM Charge	\$ 616.00
July 2011 CAM Charge	\$ 616.00
August 2011 CAM Charge	\$ 616.00
<b>Total</b>	<b>\$9,560.13</b>

**TOTAL DUE AND PAYABLE: \$9,560.13**

**YOU ARE FURTHER NOTIFIED AND REQUIRED**, pursuant to RCW 59.12, to pay the entire amount set forth herein in order to cure this default within ten (10) days of the date of service of this notice upon you, or, in the alternative, vacate and surrender the premises within these ten (10) days. Vacation of the premises does not relieve you of your delinquencies, including, but not limited to, your continuing obligation to pay all sums which are now due and those which continue to accrue under the Lease. The Landlord reserves all rights to pursue any and all available remedies to recover damages as allowed by the Lease, applicable state statute, or equity including, but not limited to, the right to terminate the Ground Lease and accelerate the rent for the balance of the term pursuant to Article 14.

Payment of the above-referenced amount should be made by cashier's check or money order and tendered to:

Firgrove Commons 3, LLC  
c/o Smith Alling, P.S.  
1102 Broadway, Suite 403  
Tacoma, WA 98402

[Exhibit 7].

(There was no testimony at trial as to how or why the “CAM charge” went from 5% of rent to the higher amount listed in the 10-Day notice.)

**TENANT STARTS DECLARATORY JUDGMENT ACTION;  
LANDLORD COUNTERCLAIMS FOR BREACH OF SECTION 3.5 OF  
LEASE**

Faced with the threat of an eviction and forfeiture of its leasehold rights, including loss of the Bank’s new building and the option to purchase the land, the Bank commenced a declaratory judgment action in Pierce County Superior Court. The Bank asked the Superior Court to declare that it was not in breach of the lease and had not lost its leasehold rights. [CP 1-6]

The Landlord counterclaimed for breach of the parties’ written lease. [CP 52-54]. The Landlord, now represented by a different attorney, did not claim the additional amounts were part of the CAM Expenses in Section 3.4 of the lease. Instead, the Landlord’s counterclaim was based on an alleged breach of Section 3.5.

Section 3.5 provides as follows:

Section 3.5. Triple Net Rent. All Base Annual Rent payable hereunder shall be paid as "triple net" rent without deduction or offset. It is the intent of the parties, except as is otherwise provided in this Lease, that Base Annual Rent provided to Landlord shall be absolutely net to Landlord, and Tenant shall pay all costs, charges, insurance premiums, taxes, utilities, expenses, and prorated share of maintenance for common area CAM expenses, and assessments of every kind and nature incurred for, against, or in connection with the Ground Leased Premises and Property. All such costs, charges, insurance premiums, taxes, utilities, expenses, and assessments covering the Ground Leased Premises shall be approximately prorated upon the expiration of this Lease.

[Exhibit 1, page 10]

The Landlord asserted no counterclaim based on *quantum meruit*, breach of an implied contract, unjust enrichment, or any other theory. [See CP 52-55]

The case proceeded to a one-day bench trial before Judge Stephanie A. Arend.

**TENANT CLAIMS NO DEDUCTIONS AGAINST, OR OFFSETS  
FROM, RENT PAYMENTS DUE UNDER THE LEASE**

The evidence at trial was that the Bank never asserted any deduction or offset against the rent, as prohibited by Section 3.5

It was undisputed that the rent as set forth in the lease was paid in full by the Bank, and that the Bank had paid all other amounts due,

including real estate taxes, utilities, and its share of the CAM Expenses.<sup>6</sup>

What the Landlord argued at trial in support of its counterclaim was that the Bank owed not only the Rent and CAM Expenses set forth in the lease, but also an additional amount as “management fees.”

The Landlord made it clear at trial that the management fees being claimed were *not* part of the CAM expenses. [RP 8:22-23]

#### **LANDLORD’S TESTIMONY AT TRIAL SUMMARIZED**

The Landlord did not testify at trial. Instead, someone on behalf of the “former” third-party management company testified by telephone in support of the Landlord’s claim. It is the “former” management company because, at some time prior to trial, whatever relationship or arrangement there had been between the Landlord and the management company was terminated. [RP 93:18-23]. The company was also terminated on another building in the Firgrove shopping center. [RP 96:9-13]

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<sup>6</sup> An issue involving use of a garbage dumpster apparently arose just prior to trial, but was resolved by the parties after the third-party management company was terminated.

In essence, the witnesses' testimony to justify the additional "fee" was that it was "standard in the industry." [RP 75:6-7].

The Landlord's witness was both a "representative" of the management company charging the fee and "manager" of the Landlord being charged the fee. [Finding No. 2; *see* signature on Exhibit 1; RP 35:15-17, RP 71:20:22, and RP 94:3-14].

The witness had no personal knowledge whether the Bank had ever asked any management company to perform any services on or for the ground leased premises, such as snow removal [RP 93:1-12] or landscaping [RP 93:13-17].

The witness did, however, outline what the management company might have been required to do regarding maintenance of the common areas (*i.e.*, the shared driveways and the sidewalks). This testimony included references such as the following:

"We are totally responsible for [keeping the *driveways into the premises* clear of snow and ice in the wintertime]"

[RP 83:14-20; emphasis added].

"Q. [D]o you believe it's feasible to not have somebody manage the property for those *common areas*? ....

A. Yes. ... Because nobody is -- you know, nobody is looking out for the *common area*. ... Viking Bank ... merely use their building and, you know, if you don't have somebody looking out for the *common areas*, they don't become maintained ....”

[RP 89: 16-22; emphasis added].

However, as to the common area maintenance expenses that were actually charged to the Bank (and paid), the witness testified that they were “all encompassing – that bill is all-encompassing.” [RP 98:24-25].

The witness also claimed that the third-party company basically “kept the books” for the Landlord. During its tenure, the company sent invoices to the Bank for rent, collected the rent, tax reimbursements,<sup>7</sup> and sewer utility payments for the landlord. No claim was made regarding the payments themselves, as the Bank fully paid all of those amounts due. [Finding No. 23; RP 97:2-25]

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<sup>7</sup> Under the lease, the Landlord has the right to have the tenant pay taxes directly and be notified via a third party tax reporting service. At no time has anyone claimed the Bank was or is in breach of the lease for making tax reimbursement payments to the landlord or any “management company.” [See RP 51:12-25]. The Bank is ready, willing, and able to make tax payments directly to the Pierce County Assessor-Treasurer, if so desired by the Landlord. However, as record title holder, the Landlord must first approve a change in the mailing address for tax statements. The same would be true for any sewer bills.

On cross-examination regarding these administrative functions, the Landlord's witness testified as follows:

Q. If the owner elects to hire a bookkeeper to collect rent and deposit it into a bank account, why should the bank be paying for that service that benefits the landlord?

A. It's standard in the industry.

[RP 102:22-25; 103:1]

The Landlord's witness also testified that "an owner could sit at home and do it himself; yes, they could. You know, it's unheard of in large complexes, but, you know, it's practical." [RP 103:9-11]

And finally, regarding Viking Bank's role in the amount being charged, the testimony was as follows:

Q. And Viking Bank had no say let alone any opportunity to negotiate this 5 percent fee, correct? That was a deal between you and Mr. Wagner and his partner, correct?

A. Yes. Yes.

[RP 104: 9-12]<sup>8</sup>

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<sup>8</sup> In April or May of 2011, the fee was increased to more than 5% of the rent. [See line items for April and May, 2011, on Exhibit 7]. There was no testimony or other evidence as to how or why this new amount was computed.

The Landlord presented no evidence as to how much labor was actually expended or what the labor expenses were for any of the services described. The closest the Landlord came to establishing any cost or expense was testimony that “the property management folks visit the site weekly or more – at least once a week or more and inspect.” [RP 76:14-25].

#### **TENANT’S TESTIMONY AT TRIAL SUMMARIZED**

The former CEO of Viking Bank, Mr. Richard Mulcahy, testified at trial on behalf of the Bank. Mr. Mulcahy had negotiated the ground lease.<sup>9</sup> Mr. Mulcahy also oversaw the construction and operation of the branch facility in Puyallup. Mr. Mulcahy personally visited the bank branch on a regular basis. [RP 45:10-11; 46:5-7].

Mr. Mulcahy’s testimony was that the Bank utilized its own, internal facilities management department to administer all aspects of the Puyallup branch – as it did for all of the other branch locations and bank administration offices Viking Bank owned and operated. [RP

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<sup>9</sup> The Landlord’s objections to testimony about the substance of those negotiations, including introduction of a ‘letter of intent’ between the parties, were sustained, since the ground lease was a fully integrated contract.

22:10-25; 23:1-10]. In fact, as Mr. Mulcahy testified, if any financial institution in the post-9/11 era wanted to utilize a third party property manager for a bank facility, there were applicable federal regulations that had to be complied with. [RP 32:15-18]

As to any “management services,” at no time did the Bank ever request – or expect – the Landlord to manage any aspect of the ground leased lot or the bank’s building, [RP 32:3-9], although Mr. Mulcahy did lodge a complaint once about trash from a popular fast-food outlet next door which ended up in the Bank’s parking lot. [RP 45:5-10]

Mr. Mulcahy’s testimony called into question the extent of the Landlord’s witness’ personal knowledge. For example, the Landlord’s witness spoke about “cleaning up a windfall tree.” [RP 78:17-18] Mr. Mulcahy, who personally visited the bank branch on a regular basis, explained that there were no trees. [RP 45:10-11; 46:5-7]

**TRIAL COURT RULES IN FAVOR OF TENANT; LANDLORD  
APPEALS**

After taking the matter under advisement for some period of time, Judge Arend authored her own written decision.

Judge Arend's written decision outlined the basic dispute, analyzed the parties' respective arguments, and explained the court's logic in ruling that the Landlord had not proven a breach of the ground lease.

The Court declared that the Bank retained its rights under the lease and did not owe the Landlord any additional money.

The Landlord then filed this appeal.

**ARGUMENT:**

**INTRODUCTION:**

The trial court's decision is based on substantial evidence presented at trial, reflects a proper interpretation of the ground lease, and is well-supported by solid precedence.

The decision should be affirmed, and the Bank should be awarded reasonable attorney fees, as provided for in the ground lease.

This brief will first review the applicable law regarding burden of proof. . Next, rules of contract interpretation and construction will be outlined and applied to the facts of this case. Then finally, three cases applying the legal principles to declaratory judgment actions involving landlord claims for “management fees” under similar situations will be discussed.

**BURDEN OF PROOF:**

At trial, the Landlord argued that the Tenant had the burden of proving it was not in breach of the lease.

In its opening brief on this appeal, the Landlord makes no direct mention of the applicable burden of proof. However, the Landlord does make this statement in its Opening Brief, “Nothing in the Lease suggests that the tenant should not be required to pay management fees incurred by the Landlord,” implying that the burden of proof lies with the Tenant.

It does not.

A party to a contract claiming another party is in breach of that contract bears the burden of proving such breach. *See* WPI 300.02

(burden of proof rests with party alleging breach of contract); *Kofmehl v. Baseline Lake, LLC*, 167 Wash.App. 677 (2012) (contract involving real estate).

In this case, the Landlord counterclaimed that the Bank breached Section 3.5 of the lease. Thus, the Landlord, not the Bank, bore the burden of proof at trial, and continues to bear the burden of proof on this appeal.

#### **RULES OF CONTRACT INTERPRETATION: MUTUAL INTENT**

The law provides that a court's role in enforcing contracts is to ascertain the parties' mutual intent.

As to fully-integrated written contracts, a court's role is to determine what the parties themselves expressed in writing, not their unexpressed or subjective intentions. *Berg v. Hudesman*, 115 Wash.2d 657, 663, 801 P.2d 222 (1990) (court may consider context of the written agreement).

As is often said, a court's role is to search for intent through the objective manifest language of the contract itself. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wash.2d 493, 503, 115 P.3d 262 (2005).

In considering the circumstances surrounding the agreement, courts examine the parties' objective manifestations of intent, but not their unilateral or subjective purposes and intentions about the meaning of what is written. In other words, we "strive to ascertain the meaning of what is written in the contract, and not what the parties intended to be written" but did not memorialize. '

*Ledaura, LLC v. Gould*, 155 Wash.App. 786, 799 (2010) (construing and interpreting lease and option to purchase in declaratory judgment action; *held*, lower court erred by interpreting option agreement as if it had an otherwise "missing" term).

Leases are contracts, as well as conveyances, and as such are to be given effect so as to carry out the intentions of the parties as manifested by the words used. *Allied Stores Corp. v. North West Bank*, 2 Wash.App. 778, 469 P.2d 993 (1970).

Under the Ground Lease, the parties' overall intent is perhaps best expressed in the recital portion of the document. The Ground Lease recites, "Landlord desires to lease to Tenant the Ground Leased Premises ... in order for Tenant to cause the construction, *management*, and operation of a retail banking facility, consisting of a building ... 32,665 square feet of land ... together with ... all

easements and appurtenances ... road, streets, alleyways bounding such property and ... all buildings and other improvements thereon, if any (collectively, “the Property” or “The Ground Leased Premises”)....” [Exhibit 1; emphasis added].

The only mention of “management” in the parties’ contract is the provision noted above.

As the trial court found and concluded, “The Ground Lease shifts the responsibility for basic property management functions to Tenant for the Ground Lease Premises and leaves Landlord with only negligible duties.”<sup>10</sup> [Finding No. 16].

When ascertaining what the parties mutually intended in the Ground Lease, one perhaps should keep in mind that all tasks that the Landlord now claims justify additional payment from the Bank as “management fees” were foreseeable.

For example, it was well within the contemplation of the parties prior to signing the lease that someone – be it the landlord, a

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<sup>10</sup> If at any time the Landlord is performing a task that is the contractual duty or obligation of the Bank, the Landlord has right to require that the Bank perform the task. However, the only claim ever asserted by the Landlord for breach of contract is based on Section 3.5. [CP 52-54]

bookkeeper, or a management company – would need to keep track of the Bank’s rent payments.

**RULE OF INTERPRETATION: DO NOT REVISE OR REWRITE  
THE PARTIES’ CONTRACT**

It is not the province of the court to make a contract for the parties or impose duties where they do not exist. *Grant County Constructors v. E. V. Lane, Corp.*, 77 Wash.2d 110, 459 P.2d 947 (1969).

Thus, courts should neither disregard contract language which the parties have employed, nor revise the contract under a theory of construing it. *Cf. Farmers Ins. Co. v. Miller*, 87 Wash.2d 70, 73, 549 P.2d 9 (1976).

“Courts do not have the power, under the guise of interpretation, to rewrite contracts which the parties have deliberately made for themselves.” *Clements v. Olsen*, 46 Wash.2d 445, 448-449, 282 P.2d 266, 268 (1955).

If the parties on this appeal had mutually intended what the Landlord now claims, they easily could have negotiated a lease clause such as the following: “In addition to rent, the Tenant shall pay the

Landlord a reasonable amount for management fees incurred in administration of the lease, including, but not limited to, billing for rent, seeking reimbursement of any taxes paid, and monitoring the Tenant's performance or non-performance under the Ground Lease.”

Or, if the parties had intended for CAM Expenses to include some additional amount based on rent, they could have revised Section 3.4.1(A) to read something like this: “CAM Expenses shall mean the reasonable costs and expenses of maintaining or repairing any entrances to or sidewalks within Firgrove Shopping Center, plus a management fee equal to 5% of the Rent, regardless of the amount of costs and expenses actually incurred in any given time period.”

What the Landlord is essentially requesting is for a court to revise or add to the parties' contract. As the Landlord states: “The Court, therefore, *must fill in* a reasonable management fee for the work performed.” [Opening Brief, page 27; emphasis added].

In the context of long-term, commercial ground leases, such matters are best left to the negotiations of the parties themselves.

**RULE OF INTERPRETATION: REASONABLENESS OF  
ALTERNATIVE INTERPRETATIONS**

In construing a lease, the court's function is to ascertain and give effect to the intention of the parties as expressed in their agreement. The agreement must be read and considered as a whole, and if, when so considered, its terms are plain and unambiguous, the intention of the parties will be deduced from the language used. Technical terms and words of art are given their technical meaning unless the context or a usage which is applicable indicates a different meaning. But *if the provisions of a lease are doubtful in that they are reasonably capable of more than one interpretation, the court will adopt that interpretation which is more favorable to the lessee*, particularly when, as here, the lease was drafted by the lessor.

*Allied Stores Corp. v. North West Bank*, 2 Wn.App. 778, 784, 469 P.2d 993 (1970) (emphasis added; citations omitted) (interpreting lease of parking garage).

The logic applied in the *Allied Stores Corp.* case applies equally well in this case.

Under the Landlord's proposed interpretation, the Bank's obligations can be changed, at any time, in an amount someone else determines to be "reasonable" or "common in the industry." The Landlord's interpretation creates a significant amount of uncertainty.

Under the Bank's (and trial court's) interpretation of the lease, the parties know exactly where they stand financially for the next 20 to 40 years. The parties can plan accordingly.

Would the Bank in this case have negotiated a lower rental rate if it had an inkling that the effective rent would be increased later over what the lease already provided? Would the Bank have negotiated a cap or limit on such additional fees or charges?

The point is that one would naturally expect all material terms - which the parties will 'live with' for the next 20 to 40 years - would be mutually discussed and negotiated *before* the lease was signed, not unilaterally imposed months later as part of some 'backcharge' on an 'invoice' that appears on its face to refer to an earlier temporary lease, for a completely different space, in another building, followed later by a 10-Day notice that included charges that did not even correspond to the "5% fee" the landlord claimed earlier.

Under the Landlord's interpretation, there is no requirement that the "fee" be related to the time, effort, or costs expended for the alleged work. Under the Landlord's interpretation, even if the management

company spent 30 minutes a month on bookkeeping tasks, the Bank would be obligated to pay thousands more a year.

Under the Landlord's argument, if the Bank's rent under the lease was, say, \$230,000 per year instead of \$115,000, the Landlord could bill twice as much for the same amount of work.<sup>11</sup> Or, the Landlord could just change the percentage – 5% this year might turn into, say, 7% the next.

Under the Landlord's argument, one party can effectively alter the terms of a long-term commercial lease by remaining silent during contract negotiations, then later claim a fee or charge is implicit under the lease – simply because one party views it as “standard in the industry”<sup>12</sup> or because they make the business decision to hire a third-party to perform tasks that they otherwise could do themselves.

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<sup>11</sup> There was no evidence presented at trial as to how much time was actually spent by the company performing the alleged “management services,” or what labor costs were actually incurred.

<sup>12</sup> The Landlord's witness never explained what “industry” was being referred to. The banking industry? ‘Ground lease’ industry, if there is such a thing? Real property development? Retail space industry? Commercial office space?

### **RULE OF INTERPREATION: SPECIFIC VS. GENERAL TERMS**

To borrow a quote from the *Allied Stores* case dealing with taxes allegedly due under a written lease, and applying it to the facts of this one involving management fees alleged to be due:

Had the parties intended, as [the landlord] asserts, that [the tenant] pay the portion of the [management fees] upon the leased premises, they could have so provided in the lease simply by using the words '[management fees]' ... When a landlord attempts to shift all or a portion of [costs or expenses] burden to the tenant, he must do so in clear and express language.

*Allied Stores Corp. v. North West Bank, supra*, at 784.

The Ground Lease in this case was not some type of “boilerplate” or “dimestore” lease. It had been negotiated by individuals with experience in commercial affairs, and reflects a certain level of customization.

When addressing the Bank’s financial obligations, the Lease contains very specific dollar amounts and percentages. The Bank’s share of CAM expenses is very specific - 25.50%. The same for lease payments - \$115,000 per year.

Similarly, when the lease calls for any increases in rent, the contract uses a precise formula – “One Hundred Ten Percent (110%) of the previous years Base Annual Rent.” [*See* Exhibit 1, §3.1, page 8].

If the parties had mutually intended for the Bank to pay the Landlord more money for lease administration services, why not include a specific provision in the ground lease? The parties were quite detailed on all other financial issues. Why leave such an important term open to later debate or dispute?

**RULE OF INTERPRETATION: IMPLIED OR MISSING TERMS**

The Landlord’s claim for breach of contract is based exclusively on the argument that the Bank breached Section 3.5 of the ground lease, which prohibits the Bank from making any “deductions or offsets” from its lease payments.

It is undisputed that the Bank fully paid rent on time. The Bank never made any deductions from its rent payments, nor did the Bank ever claim any offset against rent.

The Landlord also made it clear at trial that the management fees being claimed were *not* part of the CAM expenses.<sup>13</sup>

That leaves the Landlord only one way to shoehorn in a basis for the additional charges - the Landlord must prove that the fee is for operation or management of the Ground Leased Premises and Property under Section 3.5, not Section 3.4.

And yet, when crafting its arguments at trial and now on appeal, the Landlord does not discuss costs and expenses “incurred for, against, or in connection with the Ground Leased Premises and Property,” as the lease states. Instead, the Landlord uses terms or phrases such as the following:

- ✓ “incurred for, against, or in connection with *a lease of property* ...” [Opening Brief, page 2]
- ✓ “*functions* related to the Viking Bank property.” [Opening Brief, page 6]
- ✓ “incurred in connection with the *landlord’s ownership* ...” [Opening Brief, page. 13]

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<sup>13</sup> “The issue here is not about CAMs. It’s about management fees.” [RP 8:22-24].

Similarly, when seeking to justify “reasonableness” of the fees charged to the Bank, the Landlord’s witness outlined what was done regarding the *common areas*, not the Property or the Ground Leased Premises. For example, the Landlord’s witness spoke about “inspecting *the driveways*,” picking “up garbage and debris in the *common areas*,” replacing lights “in the *entrances*,” entering into a contract for snow removal in “the *common area driveways*,” sending employees to investigate de-icing “*of the common areas*,” doing “*common area* maintenance,” and so forth.

But again, the lease already includes specific provisions regarding the Bank’s obligations related to those common areas – Section 3.4, not 3.5.

**RULE OF INTERPRETATION: POST-CONTRACT CONDUCT**

The parties’ conduct after entering into a contract can be used as an aid in determining their mutual intent.

The fact that the Landlord in this case accepted the Bank’s rent payments for several months without objection or complaint lends further support to the court’s decision.

Similarly, the fact that the Landlord's first attorney claimed that the additional money was owed as part of the CAM Expenses under Section 3.4, and the Landlord's second attorney claimed the money was due under Section 3.5, also bears upon the parties' mutual intent.

**CASE LAW SUPPORTS AFFIRMING THE SUPERIOR COURT'S  
DECISION**

The Superior Court's Decision was supported by solid precedence. There are several out-of-state cases that have specifically addressed the issue of a landlord's efforts to impose management fees on tenants on the basis that such fees are "common" or "standard in the industry."

All of those cases were resolved in favor of the tenant and against the landlord. These cases include *K's Merchandise Mart v. Northgate Ltd.*, *McDonald's Corporation v. Goler*, and *Tin Tin Corp. v. Pacific Rim Park, LLC*. The *McDonald's* and *Tin Tin Corp.* cases were cited by the Superior Court in its Decision.

In *K's Merchandise Mart v. Northgate, Ltd.*, 359 Ill.App.3d 1137, 835 N.E.2d 965 (2005), a dispute arose whether a tenant's duty to pay a portion of CAM expenses included the obligation to pay a

management fee based on rent. The tenant initially paid invoices that showed the management fee as part of CAM expenses. The tenant later objected and commenced a declaratory judgment action to resolve the dispute.

The trial court ruled that there was no obligation under the terms of the parties' written lease for the tenant to pay the management fees. The court noted that the lease contained no such provision and to find otherwise would, in effect, be rewriting the lease to include an important term.

The decision was affirmed on appeal. The Illinois Court of Appeals held that the terms and conditions of the parties' written lease controlled. The lease included no provision for imposing a management fee. The landlord was allowed to pass on to the tenant the pro-rata portion of actual CAM expenses incurred, but not a management fee that was based on a percentage of rent.

In *McDonald's Corporation v. Goler*, 251 Neb. 934, 560 N.W.2d 458 (1997), McDonald's entered into a long-term ground lease and built its own building on the land. The building was part of a larger

shopping center. Under the ground lease, McDonald's agreed to pay a pro-rata portion of common area maintenance (CAM) expenses, plus an administrative fee equal to 15% of the total CAM expenses. The landlord added another 15% to the CAM expenses as a "management fee."

McDonald's started a declaratory judgment action to have the court determine if McDonald's was obligated to pay this additional "fee" under the terms of the parties' ground lease. The landlord in that case argued that the 15% management fee was "standard in the industry" for shopping centers.

The Supreme Court of Nebraska rejected this argument, stating, "Regardless of whatever the industry standard might be, [the ground lease] is plain and unambiguous. It authorizes [the landlord] to bill McDonald's only for costs and expenses related to the common area." *Id.* at 939-940.

In the case now before the Court, recall that the Landlord already included some type of "administrative" or "management"

charge for CAM expenses when it billed the Bank for labor at between \$47.50 and \$70.00 per hour, and marked up materials by 12%.

In *Tin Tin Corporation v. Pacific Rim Park, LLC*, 170 Cal.App.4<sup>th</sup> 1220, 88 Cal.Rptr.3d 816 (2009), tenants in a shopping center commenced a declaratory judgment action to resolve a dispute over expenses their landlord was passing on to them. Each tenant had agreed to pay a portion of the landlord's "operating" expenses. The landlord had to pay some franchise fees and taxes on rents it received; the tenants objected to paying any portion of the fees or taxes. The landlord counterclaimed for breach of contract.

The trial court found in favor of the landlord. The trial court ruled that the landlord was allowed to include the fees and taxes imposed on the landlord as part of the operating expenses, since the fees and taxes related to ownership of the shopping center.

The California Court of Appeals reversed. The Court of Appeals pointed out the lease provisions related to expenses pertaining to the physical existence of the shopping center, not the landlord's

ownership, business operations, or how the landlord elected to hold title to the real estate.

The California Court of Appeals rejected the landlord's argument that the shopping center leases were "absolute triple-net leases" which the landlord's witness claimed enabled a landlord to pass on to tenants not only the actual cost of operation, but all other expenses the landlord incurred related to ownership.

The Court of Appeals reasoned, in part:

[T]he titles or labels themselves have no legal significance and are not decisive of the extent to which the parties intended to shift the expense burdens of various operating, repair and maintenance obligations from landlord to tenant. Rather, the allocation of cost responsibilities is dictated by the substance of the lease.

*Id.*, at 1226.

And so it is in this case. Just as the ground lease in the *Tin Tin* case did not obligate the tenants to pay the property owner's franchise fees and taxes based on rental income, Section 3.5 of the ground lease in this case does not impose a contractual duty on Viking Bank to pay Firgrove Commons 3, LLC an additional percentage of rent.

Firgrove Commons 3, LLC is free to make the business decision to temporarily use another company to collect rents and handle other lease administration tasks, but it is not Viking Bank's contractual obligation to pay for that same business decision.

**ATTORNEY FEES:**

Section 18.8 of the parties' lease provides that if either party retains an attorney to enforce or interpret the lease, the prevailing party is entitled to recover reasonable attorney's fees, including for all appeals.

The Bank should be awarded reasonable fees pursuant to the lease, as allowed by RAP 18.1.

**CONCLUSION:**

The Court of Appeals should affirm the Superior Court's Decision. There was no error. The Superior Court's findings are supported by substantial evidence, and the conclusions are based on solid precedence.

Dated December 18, 2013



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### CERTIFICATE

I certify that I mailed a copy of the Respondent's Brief to the following person, at the address listed, via first class mail, postage prepaid, on December 18, 2013:

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