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AUG 06 2009

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLARK

Sherry W. Parker, Clerk, Clark Co

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6 THE PORT OF CAMAS/WASHOUGAL, a
Washington municipal corporation,

7 Petitioner,

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9 v.

10 RIVERWALK ON THE COLUMBIA,
11 LLC, a Washington limited liability
company,

12 Respondent.

Cause No. 09-2-03549-4

**THE PORT'S MOTION TO CONFIRM
ARBITRATION AWARD AND FOR
ENTRY OF JUDGMENT AGAINST
RIVERWALK ON THE COLUMBIA,
LLC**

13 Pursuant to RCW 7.04A.250, Port of Camas/Washougal ("the Port") hereby moves the
14 Court for an order confirming the arbitration award issued by the JAMS arbitration panel on July
15 31, 2009 in the arbitration between respondent Riverwalk on the Columbia, LLC ("Riverwalk"),
16 and the Port, and for entry of judgment. In support of this motion, the Port states as follows:

17 **JURISDICTION AND VENUE**

- 18 1. The Port is a Washington municipal corporation located in Washougal,
19 Washington.
20 2. Riverwalk is a Washington limited liability company with its principal place of
21 business in Vancouver, Washington.
22 3. This court has jurisdiction under RCW 7.04A.030 and JAMS Rule 25 based upon
23 the parties' agreement to arbitrate.
24 4. Venue is proper in this Court under RCW 7.04A.270.

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**THE PORT'S MOTION TO CONFIRM ARBITRATION AWARD AND FOR ENTRY OF
JUDGMENT AGAINST RIVERWALK ON THE COLUMBIA, LLC - 1**

STOEL RIVES LLP
ATTORNEYS
805 Broadway, Suite 725, Vancouver, WA 98660
Telephone (360) 699-5900

1 **BACKGROUND FACTS**

2 5. On or about November 8, 2005, the parties executed an agreement entitled
3 "Option Agreement" providing Riverwalk with an option to lease certain property owned by the
4 Port for development of a mixed use project on the Port's waterfront property and potentially the
5 property of third parties. The Option Agreement included a section entitled "Alternative Dispute
6 Resolution" which provided for arbitration of disputes administered by JAMS pursuant to its
7 arbitration rules and procedures.

8 6. On or about March 12, 2008, Riverwalk demanded arbitration with the Port under
9 JAMS rules, advising that the parties had engaged in reasonable efforts to solve the matter.

10 7. JAMS appointed three arbitrators to hear the matter. At the initial preliminary
11 hearing held on July 8, 2008, counsel for both parties waived any further right or obligation to
12 mediate this dispute prior to demanding arbitration.

13 8. At the initial preliminary hearing, counsel for the parties also agreed to stipulate
14 to bifurcating the arbitration hearing into two phases. Phase 1 would determine whether the
15 parties have any enforceable rights under the Option Agreement and whether the Option
16 Agreement had been breached, and Phase 2 would determine any remedies. Counsel for the
17 parties signed a stipulation to that effect on August 7, 2008, subsequently approved by the
18 arbitration panel.

19 9. The arbitration hearing was held on April 6-10 and April 13-15, 2009 in
20 Vancouver, Washington. On May 27, 2009, the arbitration panel issued its Interim Award
21 denying all claims of Riverwalk and declaring the Port the prevailing party for purposes of
22 Section 20 of the Option Agreement allowing for an award of attorneys' fees, costs and expenses
23 to the prevailing party.

24 10. On July 31, 2009, the arbitration panel awarded to the Port attorneys' fees in the
25 amount of \$412,066, plus costs and expenses in the amount of \$195,786.67.

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**THE PORT'S MOTION TO CONFIRM ARBITRATION AWARD AND FOR ENTRY OF
JUDGMENT AGAINST RIVERWALK ON THE COLUMBIA, LLC - 2**

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JAMS ARBITRATION IN VANCOUVER, WASHINGTON

Riverwalk on the Columbia, LLC, A
Washington limited liability company
vs.

1160017152

The Port of Camas/Washougal, a
Washington municipal corporation

Interim Arbitration Award

On or about November 8, 2005, the parties to this arbitration executed an agreement entitled "Option Agreement" providing the Claimant ("Riverwalk") with the option to lease certain property owned by the Respondent (the "Port") for development of a mixed use project that "may include a marina, hotel, offices, restaurants, retail, recreational, and residential development" under the terms of a long-term ground lease (50 years plus an option to extend the term of the lease for another 30 years) which lease had not been drafted at the time that the Option Agreement was executed. Section 28 of the Option Agreement included a section entitled "Alternative Dispute Resolution" which provided, in part:

If there is a Dispute, the parties to the Dispute shall first make efforts to resolve the Dispute through negotiation . . . ; then upon demand of either party to the Dispute, the parties to the Dispute shall make efforts to resolve the Dispute in good faith by mediation If the Dispute is not resolved by mediation . . . ; then upon the demand of either party to the Dispute, the Dispute shall be resolved by binding arbitration administered by JAMS pursuant to its most appropriate arbitration rules and procedures.

1 Riverwalk on or about March 12, 2008 demanded arbitration with the Port
2 under JAMS rules, advising that the parties had engaged in reasonable efforts to
3 settle the matter.

4 JAMS appointed three arbitrators to hear the matter: Gregory L. Bertram,
5 Judge J. Kathleen Learned (Ret.) and M. Wayne Blair, who served as chair of the
6 arbitration panel.

7 At the initial preliminary hearing held on July 8, 2008, counsel for both parties
8 waived any further right or obligation to mediate this Dispute prior to demanding
9 arbitration.

10 At the initial preliminary hearing, counsel for the parties also agreed to
11 stipulate to bifurcating the arbitration hearing into two phases. Phase I would
12 determine whether the parties have any enforceable rights under the Option
13 Agreement and whether the Option Agreement has been breached, and phase 2
14 would determine any remedies. Counsel for the parties signed a stipulation to that
15 affect on August 7, 2008, which stipulation was approved for the arbitrators by M.
16 Wayne Blair.

17 The arbitration hearings were held on April 6-10 and April 13-15, 2009 in
18 Vancouver, Washington. Throughout the hearings, Riverwalk was represented by
19 William N. Mehlhaf and David Markowitz of Markowitz, Herbold, Glade & Mehlhaf; the
20 Port was represented by D. Jeffrey Courser and Louis A. Ferreira of Stoel Rives LLP.

21 A total of 374 Exhibits were admitted at the hearing submitted by both
22 Riverwalk and the Port. (Exhibits 1-135; 200-336; 400-503) The arbitrators only
23 excluded one exhibit, Ex 463, which purported to be a redlined mark up of the Master
24 Development Agreement originally submitted by Riverwalk to the Port on about June
25 20, 2007. The arbitrators determined that the document was submitted too late in the
26

1 arbitration process, had not previously been shared with Riverwalk and, therefore,
2 was not fair to Riverwalk.

3 The undersigned arbitrators are fully advised and address the contentions as
4 follows.

5 OPTION TO LEASE

6 Was the Option Agreement, once executed, an enforceable document? At the
7 time the document was executed, in November 2005, Exhibit A, which set forth the
8 property to be leased, was not attached to the Option Agreement. Exhibit A,
9 prepared by a title insurance company, was attached at some point later in time by a
10 person no one at the hearing could identify with certainty. Most importantly, the
11 Option Agreement (Ex 1) provides in Section 2 that the "Port hereby grants to
12 Riverwalk the exclusive option to long-term ground lease from the Port **certain**
13 **parcels** of the Property located in Clark County, Washington all within the property
14 described in Exhibit A as **mutually agreed** to by the parties during the option period.
15 . . ." (emphasis added) The evidence at the hearing as determined by the arbitrators
16 is that the parties never did "mutually agree" on the property to be leased during the
17 term of the Option Agreement.

18 In addition, Section 25 of the Option Agreement provides that the following
19 documents "contemplated for completion prior to the exercise of this Option
20 Agreement include but are not necessarily limited to the following:

21 **25.1 Master Development Agreement.** The Master Development
22 Agreement between the City of Washougal, Port and Riverwalk providing for the
23 redevelopment of the Property.

24 **25.2 Ground Lease.** Riverwalk and Port contemplate entering into a fifty
25 (50) year ground lease with a thirty (30) year option to extend for that Property which
26 development can occur under existing zoning designations for the Property

1 25.3 Appropriate Covenants, Conditions, Restrictions Easements Shared
2 Parking Agreement, and any and all other necessary documentation necessary for
3 the redevelopment of the Property and creation of the project.”

4 The arbitrators conclude that Sections 25.1, 25.2 and 25.3 were conditions
5 precedent to the exercise of the Option Agreement. Even though the primary drafter
6 of the Option Agreement testified at the hearing that he did not intend for these
7 subsections of the Option Agreement to be conditions precedent, the evidence, such
8 as correspondence between Riverwalk and its counsel clearly showed that these
9 sections were considered by counsel to be conditions precedent. The City of
10 Washougal never was asked and never did sign any Master Development Agreement
11 (“MDA”) prior to the expiration of the Option Agreement (which was twice extended
12 for six months per the Option Agreement) to November 7, 2007 and the arbitrators
13 find that the requirement was not waived by the Port.

14 Likewise, the long-term ground lease was never prepared by Riverwalk in a
15 form satisfactory to the Port, nor timely submitted either at the time the Master
16 Development Agreement draft was submitted to the Port for review on June 20, 2007,
17 or later.

18 Riverwalk never did any real work to develop the CC&Rs (Covenants,
19 Conditions and Restrictions) as provided in Section 25.3 of the Option Agreement.

20 There were other key terms in the Option Agreement that needed to be agreed
21 upon between the parties before any option could be exercised, such as a method for
22 determining how revenue and expenses from development of the Port’s property
23 would be shared, and how the crucial terms “net rent” and “net revenue” would be
24 defined. The parties never agreed upon any “payments” that would be required
25 under Paragraph 2.
26

1 For these reasons, the arbitrators conclude that an option to lease Port
2 property was not subject to being exercised either at the time the Option Agreement
3 was originally executed or two years later when the option term was about to expire,
4 or at anytime in between those dates.

5 6 AGREEMENT TO NEGOTIATE

7 The Arbitrators find, and the Port never denied, that the Agreement between
8 the parties was an "agreement to negotiate" and imposed certain duties on both
9 parties.

10 Section 24 of the Option Agreement provides that "Riverwalk and Port shall
11 use their continuous best efforts during the term of this Option Agreement to
12 negotiate and document the transaction contemplated herein between Port and
13 Riverwalk as well as the actions and transactions with the City of Washougal as
14 herein provided." This agreement to negotiate and document regarding the land
15 lease and the development project was an "agreement to negotiate" as that term is
16 described in the case of *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn. 2d 171
17 (2004). It was not an agreement with open terms. As an agreement to negotiate, the
18 arbitrators conclude that both parties had obligations under the Option Agreement to
19 exercise their continuous best efforts "to negotiate and document" during the term of
20 the Option. Continuous best efforts does not mean compromising the self interest of
21 either party nor does it dictate any particular terms, nor mandate actually reaching an
22 agreement. The term "continuous best efforts means" a willingness to negotiate in
23 good faith, and to communicate with candor.

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**Exhibit A**

1 THE PORT'S CONDUCT

2 Riverwalk asserts that the Port failed to exercise its continuous best efforts at
3 various times during the term of the Option Agreement and that Riverwalk was
4 thereby excused in its performance of the conditions precedent.

5 1. Riverwalk contends that the Port failed to exercise its continuous best
6 efforts when the Commissioners on or about August 21, 2006 met with Riverwalk's
7 lawyer at the time, Steve Horenstein, but failed to advise Riverwalk that the Port was
8 questioning the enforceability of the agreement. The arbitrators find that at this time
9 the Commissioners of the Port were having concerns about the Agreement as a
10 result of both staff and public criticism. Having such concerns was not a breach of
11 best efforts. The Port had a duty to itself and the public to determine where it stood
12 legally and to continually assess its responsibilities for the public's property. Certainly
13 the Port could have, and perhaps should have been more candid about their
14 concerns and suggested a meeting between the lawyers, at least, to clarify the legal
15 issues and how best to respond to the legitimate questions raised by the public.
16 However, it is not clear that Horenstein or Riverwalk would have responded co-
17 operatively to such suggestions, since they were rattling the "superior court"
18 alternative and the "immediate option exercise" saber. Further, Riverwalk's website
19 about the project with its questions and answers shows that Riverwalk was certainly
20 aware of the public's concerns. The testimony made clear that Riverwalk was aware
21 of the potential "unenforceability" of the agreement to lease and had no less of a duty
22 (or interest) than the Port at this time to address and resolve this issue. And, most
23 importantly, this issue did not prevent or excuse Riverwalk's performance of the
24 condition's precedent.

25 2. Riverwalk also claims that the Port breached the best efforts requirement by
26 not agreeing to their request for a meeting with the Port Commissioners on or about

1 February 28, 2007. The Commissioners informally decided not to meet until the
2 Waterfront Advisory Committee ("WAC") had issued its report. At that point in time, it
3 was unclear when the report might be submitted. The WAC report was eventually
4 submitted June 14, 2007, some three and one-half months after the request to meet.
5 The decision by the Port Commissioners not to meet in open public meeting was not
6 unreasonable, and Riverwalk apparently agreed that it wanted the public input before
7 finalizing Riverwalk's development plans. Although it probably would have been
8 illuminating and helpful for representatives of Riverwalk and its lawyer and the Port's
9 lawyer and staff to meet for a candid discussion about the status of the project, the
10 status of the Master Development Agreement, the status of the long-term ground
11 lease, the status of the project's financial feasibility and the lack of the City of
12 Washougal's participation in Master Development Agreement, the Port did not
13 prevent or refuse such a meeting and therefore is not in violation of the continuous
14 best efforts standard. Riverwalk's testimony was that they had been meeting with
15 Port staff all along and Riverwalk knew a lot more than the Port about the hurdles the
16 project was facing. Even while awaiting the final WAC report there was nothing
17 preventing Riverwalk in the spring of 2007 from forwarding a draft lease or draft MDA
18 to the Port to get the negotiations going on these documents. The testimony
19 established that Riverwalk at that time already knew that it was going to be proposing
20 terms to which the Port would likely object to (e.g. the absence of the City of
21 Washougal as a party to the MDA and that the Port would deliver at its expense "pad-
22 ready" sites). Failure to submit a draft MDA prior to June of 2007 cannot be blamed
23 on the Port. Riverwalk was not being candid with the Port during this period about
24 the difficulties facing it. Perhaps if the Port staff and lawyer and at least one
25 commissioner had asked for a candid update from Riverwalk in the early spring, the
26 "day of reckoning" for this project would have come at an earlier date. However, it

1 was only the duty of the Port to negotiate, not to save Riverwalk from the obstacles
2 and difficulties it was having.

3 We conclude that the failure of the commissioners to meet formally with
4 Riverwalk in the spring of 2007 did not violate the Port's duty to exercise its
5 continuous best efforts, nor excuse Riverwalk's performance of its conditions
6 precedent.

7 3. Riverwalk's major complaint against the Port was a three month delay
8 between the time that Riverwalk presented a draft MDA and the receipt of the Port's
9 written response to that draft.

10 On June 20, 2007, Riverwalk through its counsel provided a draft of the
11 Master Development Agreement, as set forth in Section 25.1 of the Option
12 Agreement, to counsel for the Port, Shawn Macpherson, who promptly provided a
13 copy to the Commissioners and to the executive staff at the Port. MacPherson
14 advised Riverwalk's attorney, Meridee Pabst, who was working with Mr. Horenstein,
15 orally that he saw a number of problems with the MDA and pointed out several of
16 them to her. MacPherson then went on vacation (known to Riverwalk) until shortly
17 after the 4th of July. A meeting was scheduled between the Port and Riverwalk for
18 later in July but it was cancelled by Riverwalk apparently due to some scheduling
19 conflicts. On August 2, 2007 Shawn Macpherson advised Riverwalk that the Port
20 decided to hire outside counsel to review the Master Development Agreement and
21 that this would take some additional time. Mr. Macpherson wrote a letter to counsel
22 for the Port dated September 14, 2007, expressing a number of very significant
23 concerns about the draft of the Master Development Agreement, several of which he
24 had already identified to Ms. Pabst orally in June.

25 It was reasonable for the Port to wait for outside counsel to finish its work after
26 receiving a draft MDA that departed so significantly from what was reasonably

1 expected for such a document. In retrospect MacPherson probably could have
2 written his September letter (or a similar one) two months earlier, however it was
3 clear from the internal communications between Riverwalk and its lawyers that they
4 knew (or should have known) that the Port was not going to accept any "new" terms
5 that the draft MDA proposed, such as non-inclusion of the City of Washougal and for
6 the Port to deliver pad-ready sites at its expense, for example. From the internal
7 correspondence, it appears that Riverwalk was continuing to work on the MDA and
8 certainly could and should have been preparing plans for what to do in the face of
9 anticipated Port rejection of their proposals.

10 4. Riverwalk contends that when the parties finally did meet on September 26,
11 2007, the Port was not negotiating in good faith when the Port advised the principals
12 of Riverwalk that the project as originally envisioned was no longer a subject of
13 discussion and that instead the Port would discuss a ground-lease of a smaller parcel
14 of 14.7 acres on the east end of Port property.

15 The proposal to make available for lease only 14.7 acres was not a breach of
16 the continuous best efforts standard. Nor was it a breach for the Port to conclude the
17 draft of the Master Development Agreement was inadequate, which it was. As stated
18 above, the Port was not obligated under the Option Agreement to lease the Property,
19 or any portion of it, but only to exercise continuous best efforts in the negotiations.
20 Over the next three months (including the time after the Option Agreement had
21 expired), the parties continued to negotiate over the terms of any ground-lease of the
22 eastern 14.7 acres, which was the only feasible area to develop, after all of the site
23 constraints had been applied to the project. Eventually, on or about December 31,
24 2007, the principals of Riverwalk determined that they could not work with any draft
25 of the lease proposed by the Port and demanded arbitration.
26

1 In conclusion, we find that conduct of the Port did not violate the continuous
2 best efforts standard, or excuse or prevent Riverwalk from performance of the
3 conditions precedent of the Option Agreement or prevent Riverwalk from presenting
4 an acceptable proposal to the Port.

5 6 THE CONDUCT OF RIVERWALK

7 As the Port was obligated to exercise its continuous best efforts under the
8 Option Agreement so was Riverwalk. We believe that the circumstances described
9 below constitute a breach by Riverwalk of its duty to exercise continuous best efforts
10 under the Option Agreement.

11 1. As a condition precedent to exercising the option to lease under the Option
12 Agreement, Riverwalk was obligated to draft a Master Development Agreement
13 acceptable both to the City of Washougal and the Port which would include as an
14 exhibit a long-term ground lease and to complete the other conditions set out in
15 Section 25 of the Option Agreement. The Master Development Agreement was not a
16 defined term in the Option Agreement. However, counsel for Riverwalk, Steve
17 Horenstein, was an experienced developer's lawyer and had represented many
18 developers in the past in drafting Master Development Agreements. The arbitrators
19 were shown, as evidence at the hearing, copies of other Master Development
20 Agreements that he had drafted in the past.

21 Shortly after execution of the Option Agreement, on or about December 5,
22 2005, Riverwalk's attorney Steve Horenstein prepared a project checklist for his client
23 (Ex. 22). This memorandum provided an extensive list of steps necessary to make
24 the project a reality. The list included general due diligence, preparation of a Master
25 Dvelopment Agreement, Ground Lease, and other ancillary agreements with the Port.
26 Also included were recommendations to engage in a community renewal process

1 with the City as well as obtain land use approvals consistent with the Master Plan.
2 Other issues identified by Mr. Horenstein concerned identification of infrastructure
3 needs and costs, environmental regulatory concerns and the SR 14 highway access
4 point matter as well as shoreline permitting. Horenstein indicated that a timeline
5 needed to be established for completion of these items. Riverwalk never did publish
6 or implement a timeline in response to this memorandum, nor satisfactorily complete
7 most of the steps outlined by Mr. Horenstein in his letter.

8 It was clear from Horenstein's and Pabst's correspondence with Riverwalk that
9 they knew that a MDA was a condition precedent under the Agreement and that they
10 had an understanding of what such an MDA would include.

11 2. For reasons that were never satisfactorily explained to the arbitrators, the
12 Master Development Agreement as drafted and submitted to the Port on June 20,
13 2007, never had any site plan attached (showing the acreage and basic layout of
14 proposed streets, utilities, buildings on the property to be developed), never included
15 any draft of a long-term ground lease, never had any provision for submission of the
16 draft to the City of Washougal and never included any financial feasibility information.

17 Out of all of the many, many documents submitted by consultants engaged by
18 Riverwalk for development of the leased property, none of those documents set forth
19 a site plan of less than 65 acres that Riverwalk hoped to be able to develop. By that
20 time in the feasibility process, it was clear to all that Riverwalk would not be able to
21 develop 65 acres because the Port did not own 65 acres and that the only feasible
22 area to be developed was the 14.7 acres on the east side of the Port property.
23 Nonetheless, the principals of Riverwalk never put together, nor had its consultants
24 put together, a feasible site plan for the property that was subject to development
25 given the site constraints on the property. Riverwalk never really dealt with the blow
26

Exhibit A

1 to their visionary plan by Riverwalk's inability to purchase the Hambleton property,
2 and never came up with alternatives to their "vision."

3 3. One of the consultants engaged by Riverwalk as a part of its feasibility
4 study was RSW Construction Services. As we understood, RSW was to engage in a
5 financial feasibility study of the project. No financial feasibility study was ever
6 submitted to the Port for its review. The arbitrators could not understand why these
7 steps were never taken by any serious developer. The explanations that we received
8 during the arbitration hearing were inadequate to explain these serious omissions.
9 It was Riverwalk's duty to propose a plan, not the City's, or the Port's so that
10 negotiations could proceed.

11 4. During or before August 2006, Riverwalk heard rumors that the Port was
12 questioning the "enforceability" of the lease option. Riverwalk's attorney Horenstein
13 attended a Commissioner meeting and, with instructions from his clients to "be tough"
14 he suggested litigation or an immediate exercise of the lease option. He then claimed
15 that "someone," unnamed, assured him that there were "no problems." Riverwalk's
16 attorney was as able as the Port's attorneys (in house or outside) to review and
17 obtain advise regarding the document's enforceability and its suitability for the
18 purposes desired. It was not reasonable to rely on a supposed "all's okay" comment
19 from an unknown speaker. Enforceable or not, the Port continued to carry out its
20 obligations under the agreement. If Riverwalk were truly concerned about proceeding
21 in the face of uncertainty, best efforts in negotiating would have required them to
22 approach the Port, not with threats, but with an eye to resolving issues.

23 5. By the Spring of 2007, Riverwalk and their attorney knew more than the
24 Port of the difficulties the project was facing in meeting the conditions precedent
25 expressed in the Option Agreement and the project in general. It should have been
26 obvious to the principals of Riverwalk that the project was severely hampered by

1 Riverwalk's inability to purchase the Hambelton property and by the ambitious time
2 frame of the two year Option Agreement for such a complex project. It was no secret
3 to Riverwalk that the Commissioners could not meet with the principals of Riverwalk
4 except in open public meeting and that therefore the principals should have
5 vigorously pursued some type of "status" discussions with Port legal counsel and
6 staff during the first half of 2007.

7 6. Lastly, it was clear from the attorney/client communications of Riverwalk
8 during 2007 that it knew that the proposed MDA would be attempting to change
9 some basic terms of the Option Agreement and would in many ways likely be
10 unacceptable to the Port. Nevertheless rather than discuss all this candidly with
11 management of the Port through the Spring of 2007, the principals waited until June
12 20 to propose an obviously inadequate MDA and then tried to shift the blame for "no
13 response" onto the Port. Other than attaching the WAC's report to the MDA, there
14 was nothing provided in the Master Development Agreement document that
15 "required" Riverwalk to await the WAC report to start negotiating the MDA, such as
16 notifying the Port that they were not going to have the City of Washougal as a party.
17 It was clear that the project was having both serious site and financial feasibility
18 issues that the developers were not sharing with the Port. Although not required to
19 share all their internal financial problems, their good faith obligations to exercise
20 continuous best efforts extended to informing the Port in a timely manner of their
21 ability to proceed with the project. It was misleading to both the Port and the Public
22 to not level with them regarding the various project problems and hurdles that the
23 developers were facing.

1 PROJECT COMPLICATIONS

2 1. The undersigned cannot merely focus on the conduct of the parties in
3 negotiating and documenting the "transaction." The numerous substantive
4 impediments to development that emerged were far more significant to this project's
5 demise than any alleged conduct of the Port. The original "vision" was for a 65 acre
6 development; however, that was never a possibility. Some of the 38 acres owned by
7 the Port was subject to leases with various commercial enterprises. Most
8 significantly, between property owned by the Port and others lay the 26 acre lumber
9 mill owned by the Hambleton family. In order to fulfill its vision of an aesthetically
10 integrated mixed use waterfront development as envisioned by the parties the
11 Hambleton property had to be acquired by Riverwalk. It was undisputed that the
12 Hambleton family would not sell and this could not be done either during the option
13 period or the foreseeable future. There was also a large gas pipeline beneath the
14 westerly tract of Port property; the projected project was overlain with designated
15 wetlands and shoreland setbacks; there was considerable uncertainty concerning the
16 availability of utilities, and transportation access from SR 14 was never satisfactorily
17 resolved.

18 2. The arbitrators conclude also that the original principals, Mark Benson and
19 Rick Bowler, and subsequently John McKibbin lacked the development expertise for
20 a project of this magnitude and complexity. Although their lack of expertise was not
21 itself a violation of the best efforts requirement of the Option Agreement, the
22 arbitrators conclude that lack of experience was a major contributing factor to the
23 demise of the project and overshadowed any of the Port's conduct complained of by
24 Riverwalk.

25
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**Exhibit A**

1 CONCLUSION


2 The arbitrators conclude that the Option Agreement was not subject to being
3 exercised either at the time it was originally executed or two years later when the
4 option term was about to expire, or at anytime in between those dates. We find that
5 the parties did have an enforceable agreement to negotiate using their continuous
6 best efforts. We find that Riverwalk, but not the Port, breached on a number of
7 occasions, as stated above, its duty to exercise its continuous best efforts. Lastly we
8 find that no alleged conduct or omission by the Port excused any lack of performance
9 by Riverwalk of the conditions precedent provided in Section 25 of the Option
10 Agreement, nor did any conduct of the Port prevent or delay Riverside in presenting
11 feasible project proposals to the Port as the basis for further negotiations. The claims
12 of Riverwalk will be denied and the Port will be declared the prevailing party for
13 purposes of Section 20 of the Option Agreement.

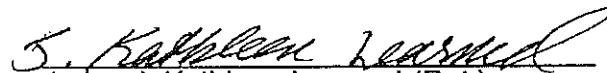
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15 [The remainder of this page is intentionally omitted and the signature page for
16 the arbitrators is on the following page.]
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Exhibit A

Signature Page for Arbitrators in Case of Riverwalk on Columbia LLC v. The Port
of Camas/Washougal

Dated: MAY 27, 2009


M. Wayne Blain
Arbitrator


Judge J. Kathleen Learned (Ret.)
Arbitrator



Gregory L. Bertram
Arbitrator

Exhibit A

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: RiverWalk on the Columbia LLC vs. Port of Camas-Washougal
Reference No. 1160017152

I, Michele Wilson, not a party to the within action, hereby declare that on May 29, 2009 I served the attached Interim Arbitration Award on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Seattle, WASHINGTON, addressed as follows:

Shawn R. MacPherson Esq.
430 NE Everett St.
Camas, WA 98607-2115
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I declare under penalty of perjury the foregoing to be true and correct. Executed at
Seattle, WASHINGTON on May 29, 2009.



Michele Wilson
mwilson@jamsadr.com

Exhibit A

JAMS
One Union Square
600 University Street
Suite 1910
Seattle, WA 98101

IN ARBITRATION

Riverwalk on the Columbia LLC,)	
)	Ref: 1160017152
Claimant,)	
)	FINAL AWARD RE: PORT'S MOTION FOR
v.)	AWARD OF ATTORNEY FEES, COSTS
)	AND EXPENSES
Port of Camas-Washougal)	
)	
Respondent.)	
_____)	

The Port of Camas-Washougal ("Port") as the prevailing party in this arbitration has moved for an award of attorney fees, costs and expenses. The Port's motion is based upon JAMS Comprehensive Arbitration Rules 24 (c), (f), and (g), and the November 8, 2005 Option Agreement between the parties. Claimant Riverwalk on the Columbia, LLC ("Riverwalk") opposes the Port's motion.

The Arbitrators have reviewed the Port's Motion for An Award of Attorney's Fees, Costs, and Expenses and Memorandum in Support; Claimant's Memorandum In Opposition to the Port's Motion for an Award of Attorneys' Fees, Costs and Expenses; The Port's reply in Support of Motion for an Award of Attorneys' Fees, Costs and Expenses; Claimant's Motion for Leave to file a supplemental memorandum in opposition to the Port's Motion for Attorneys' Fees, Costs and Expenses; and Claimant's Supplemental memorandum in Opposition to the Port's Motion for Attorneys' Fees.

Oral Argument was heard by the Arbitrators via telephone conference on July 7, 2009. The Arbitrators are fully advised and rule as follows:

The Port is entitled to an award of attorneys' fees, costs and expenses.

Although Riverwalk contends that the language of the Option Agreement does not entitle any party to an award of attorneys' fees and costs because the arbitration proceeding was not "litigation or legal proceedings" within the meaning of paragraph 20 of the Option Agreement. The Arbitrators disagree. Paragraphs 20 and 28 of the Option Agreement and JAMS Rule 24 provide a sufficient basis in this instance for an award of attorneys' fee, costs and expenses. JAMS Rule 24(f) authorizes an allocation of arbitrator fees and expenses absent the parties' agreement to the contrary. Nothing prohibits such an allocation here.

JAMS Rule 24(g) authorizes an allocation of attorneys' fees and expenses "... if provided by the parties' agreement or allowed by applicable law." Paragraph 20 of the parties' Option Agreement obligates the losing party "...to pay the prevailing party's reasonable attorney fees incident to said litigation or legal proceedings, together with costs and expenses reasonably incurred in connection with such action. . ."

Riverwalk contends that the arbitration between the parties was not "litigation or legal proceedings" within the meaning of paragraph 20 of the Option Agreement. Notwithstanding Riverwalk's argument to the contrary, this arbitration has at all times been and continues to be a "legal proceeding." This proceeding is adjudicative and is further intended to fully and finally determine the parties' legal rights and obligations inter se. Paragraph 28 of the Option Agreement specifically provides that the arbitration shall be of equal dignity to a judgment of a court of competent jurisdiction and shall be enforceable in the same manner. The transformation of the arbitration award to an enforceable judgment does not in any way suggest that the award is less than legal in essence. However, although the Port's entitlement to an award of fees, costs and expenses is clear, a number of Riverwalk's objections to amounts claimed by the Port are valid.

The Applicable Legal Standard

The parties agree that Washington typically follows the lodestar approach whereby a reasonable hourly rate is first multiplied by the reasonable number of hours expended. *Crest, Inc v. Costco Wholesale Corp.*, 128 Wn. App. 760. The award is adjusted depending upon a number of factors. Examples include the amount claimed, unusual or difficult nature of the case and the result obtained are items that may also be considered by the tribunal. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581 (1983).

Additional guidance concerning the reasonableness of attorneys' fees is provided by the factors enumerated by Rules of Professional Conduct 1.5:

(a) A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation and ability of the lawyer or lawyers;
- (8) whether the fee is fixed or contingent; and,

- (9) The terms of the fee agreement between the lawyer and the client, including whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and the lawyer's billing practices.

The party seeking attorneys' fees has the burden to document the reasonable hours it incurred.

Beckman v. Wilcox, 96 Wn.App. 355 (1998).

With the above principles in mind, the Arbitrators have assessed the merits of the Port's claim for attorneys' fees, costs and expenses.

The Port Is Not Entitled To Attorney Fees For Redacted Entries

The Arbitrators agree with Riverwalk that the Port is not entitled to attorney fees for redacted entries. Absent any description of the work performed, the Port is unable to meet its burden of reasonableness and the Arbitrators are entirely deprived of any ability to scrutinize the same. Accordingly the sum of \$79,289.75 is deducted from the award.

The Port Is Not Entitled To An Award Of Attorney Fees Claimed By Shawn MacPherson

The evidence supports Riverwalk's contention that throughout the dispute Mr. MacPherson was an important agent of and fact witness for the Port. The Port was aware of and should have anticipated, this reality at the time Riverwalk filed its Demand for Arbitration. Moreover, there is no rational basis for the Arbitrators to distinguish the essential nature of Mr. MacPherson's role at any particular time or whether, if he was acting as counsel, whether his function as an attorney was reasonable, necessary and non-duplicative of other defense efforts. Thus the sums of \$40,071.00 and \$205.47 are deducted from the award.

The Port's Partially Redacted Time Entries

Partially redacted attorney time entries are no more helpful in enabling the Arbitrators to determine the reasonableness thereof than are entirely redacted entries. Riverwalk has calculated a total of \$204,875.00 for such partially redacted entries and proposes a 50% reduction. Riverwalk's proposal is reasonable and the sum of \$101,559.25 shall be reduced from the Port's attorney fee claim. (No reduction is made for MacPherson's billings as the panel has determined above that his time is not chargeable to Riverwalk.)

There Is No Per Se Rule Against "Block Billing" Under Applicable Law And Riverwalk's Objection To Such

Entries Are Rejected

In its opposition to the Port's Motion for Attorneys' Fees, etc., Riverwalk objects to so-called "vague" and "block billed" time entries. See Claimant's Opposition at pages 13-16. Under the all of the relevant circumstances of this case, the Arbitrators find that with the exception of Mr. MacPherson's charges, the time entries objected to by Riverwalk appear reasonable.

At pages 16-18 of its opposition to the Port's motion for attorneys' fees, costs and expenses, Riverwalk cites instances in which the Port's counsel allegedly failed to delegate various tasks to attorneys or others whose time could be charged at a lower rates. The Arbitrators decline to second guess the professional judgment of the Port's counsel in this request.

The Port's Claimed Deposition Costs Are Appropriate

Notwithstanding Riverwalk's objections at page 19 of its opposition to the Port's motion for fees and costs, the Arbitrators conclude that the referenced depositions were "used" for substantive purposes at the arbitration hearing.

Trial Time Charges Of Some Of The Port's Counsel Are Not Unreasonable

Although Mr. MacPherson's travel time charges are disallowed as explained above, travel time claimed by other legal representatives of the Port are not unreasonable.

Although The Port's Costs Claim For Audio And Visual Support Is Very Substantial, Relevant Circumstances Warrant Only A Partial Reduction

The Port has claimed approximately \$81,592.40 for audio and visual support entirely all of which was provided by By Designed Legal Graphics, Inc. ("BDLG"). Riverwalk has objected on the grounds that the Port has failed to provide any evidence to support either the claimed hourly rates of BDLG staff or similar costs of industry competitors. Although this technology was of considerable assistance to the Arbitrators, Riverwalk's objections have some merit. While there is no normal basis to reduce the claimed expenses to less than or equal to those incurred by Riverwalk, a reduction of \$25,000.00 should be assessed leaving a balance of \$56,592.40.

The Port's Inclusion Of The Olson Engineering Costs/Expenses Is Reasonable

Although Riverwalk objects to this expense of \$8,173.25 (See Riverwalk opposition at pages 22-23), the exhibit in question was extremely helpful for the Arbitrators in a number of respects. At a minimum, the exhibit readily enabled the Arbitrators to appreciate and assess the enormity of the

obstacles to a viable commercial development by Riverwalk on Port property regardless of what legal boundaries were used.

The Arbitrators Decline To Reduce The Rate Charged By Port Counsel For Paralegal Services

Finally, this objection by Riverwalk (Riverwalk opposition at page 23) is merely quarrelsome at a minimum and is therefore rejected.

Fees Claimed By Counsel For The Port For Filing And Preparation Of Dispositive Motions Are Reasonable

Riverwalk has objected to the Port's attorney fee claim concerning a summary judgment motion that was argued and denied and a second dispositive motion that may have been served but was not argued. (See Riverwalk's Memorandum In Opposition pp. 24-26) Although the summary judgment motion that was argued was, indeed, denied, that effort and Riverwalk's opposing pleadings were of assistance to the Arbitrators in identifying the pertinent legal and factual issues in the case.

The Port's subsequent motion addressing Riverwalk's specific performance claim, although never argued, apparently played a role in Riverwalk's decision to withdraw that claim. Thus, Riverwalk's assertion that these were "unsuccessful" efforts is overstated, especially in view of the ultimate disposition of the case.

The Port's Claim Of An Additional \$19,600.50 For Post-Interim Award Attorney Fees Is Excessive

In the Arbitrators' view, this claimed charge appears excessive under the circumstances. While by no means all of Riverwalk's objections to the Port's fees and costs claim are correct, it should not be punished simply for raising certain questions. In view of the very substantial sum claimed by the Port it should certainly have expected some opposition to these charges. An examination of the Port's time

entries in this respect merits a reduction of 50%. Accordingly, the Port is awarded the sum of \$5,000.00 for post-Interim Award attorney fees.

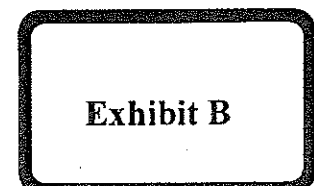
REVISED CALCULATION OF PORT'S ATTORNEY FEES, COSTS AND EXPENSES

<u>ITEM</u>	<u>AMOUNT</u>	
Attorney Fees	Claimed	\$627,986.00
	Less	\$220,920.00
	Net Amount	\$407,066.00
Post-Interim Award Attorney Fees	Claimed	\$19,600.00
	Less	\$14,600.00
	Net Amount	\$5,000.00
Expenses	Claimed	\$137,351.05
	Less	\$25,205.47
	Net Amount	\$112,145.58
*JAMS Fees, etc.	Claimed	\$83,641.09
	Allowed	\$83,641.09
<u>Total attorney fees and costs allowed</u>		<u>\$607,852.67</u>

*Note: JAMS fees shall be revised to include the expenses of adjudicating post-Interim Award proceedings.

Conclusion

The Port's claim for attorney fees, costs and expenses is substantial. However, the case was legally and factually complex. The Port clearly prevailed against all claims aggressively asserted by



Riverwalk and its own determined counsel. The Interim Arbitration Award dated May 26, 2009 is incorporated by this reference as if fully set forth.

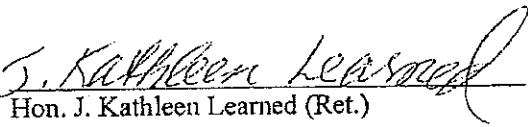
Final Arbitration Award

This Final Arbitration Award is in full and final resolution of all claims submitted by the parties to this arbitration.

DATED this 28 day of July 2009.

Gregory L. Bertram, Esq.

M. Wayne Blair, Esq.



Hon. J. Kathleen Learned (Ret.)

Riverwalk and its own determined counsel. The Interim Arbitration Award dated May 26, 2009 is incorporated by this reference as if fully set forth.

Final Arbitration Award

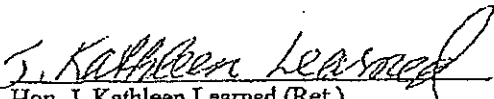
This Final Arbitration Award is in full and final resolution of all claims submitted by the parties to this arbitration.

DATED this 29 day of July 2009.

Gregory L. Bertram, Esq.



M. Wayne Blair, Esq.



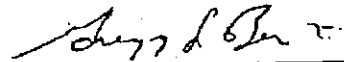
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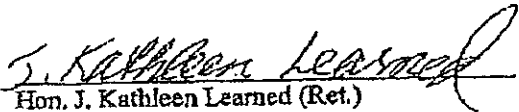
DATED this 31st day of July 2009.



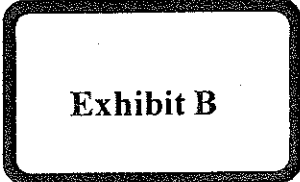
Gregory L. Bertram, Esq.



M. Wayne Blair, Esq.



Hon. J. Kathleen Learned (Ret.)



1
2 SUPERIOR COURT OF WASHINGTON
3 COUNTY OF CLARK

4 THE PORT OF CAMAS/WASHOUGAL, a
Washington municipal corporation,

5 Petitioner,

6 v.

7 RIVERWALK ON THE COLUMBIA,
8 LLC, a Washington limited liability
9 company,

10 Respondent.

Cause No.

**ORDER CONFIRMING
ARBITRATION AWARD AND
GRANTING ENTRY OF JUDGMENT
AGAINST RIVERWALK ON THE
COLUMBIA, LLC**

11 This matter came before the court on the Port of Camas/Washougal's Motion to Confirm
12 Arbitration Award and for Entry of Judgment Against Riverwalk on the Columbia, LLC. The
13 court having reviewed the records and files herein, now therefore:

14 IT IS HEREBY ORDERED that:

- 15 1. The Interim Award issued by the JAMS arbitration panel on May 27, 2009
16 denying all claims by Riverwalk and declaring the Port the prevailing party is hereby confirmed.
17 2. The proposed Judgment against Riverwalk on the Columbia, LLC, the form of
18 which is attached hereto as Exhibit A, shall be entered so that such Judgment may be recorded,
19 docketed and enforced as any other judgment in a civil action.

20 DATED: August ____, 2009.

21 _____
Superior Court Judge

22 PRESENTED BY:

23 _____
24 D. Jeffrey Courser, WSB No. 15466
25 Louis A. Ferreira, WSB No. 20646
26 Of Attorneys for the Port of Camas/Washougal

Exhibit C

**ORDER CONFIRMING ARBITRATION AWARD AND GRANTING ENTRY OF
JUDGMENT AGAINST RIVERWALK ON THE COLUMBIA, LLC - 1**

JUDGMENT SUMMARY

Judgment Creditor: The Port of Camas/Washougal

Attorney for Judgment Creditor: D. Jeffrey Courser
Louis A. Ferreira
Stoel Rives LLP
805 Broadway, Suite 725
Vancouver WA 98660

Judgment Debtor: Riverwalk on the Columbia, LLC

Attorney for Judgment Debtor: William N. Mehlhaf
Markowitz Herbold Glade & Mehlhaf PC
1211 SW Fifth Avenue, Suite 3000
Portland OR 97204

Attorneys' Fees: \$ 412,066
Costs and Expenses: \$ 195,786.67
Total Amount of Judgment: \$ 607,852.67

Post-judgment interest shall accrue per annum from entry of judgment until paid at 12%.

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLARK

THE PORT OF CAMAS/WASHOUGAL, a
Washington municipal corporation,

Petitioner,

v.

RIVERWALK ON THE COLUMBIA,
LLC, a Washington limited liability
company,

Respondent.

Cause No.

JUDGMENT AGAINST RIVERWALK
ON THE COLUMBIA, LLC

This matter came before the court on the Port of Camas/Washougal's Motion to Confirm Arbitration Award and for Entry of Judgment Against Riverwalk on the Columbia, LLC. The court having reviewed the records and files herein and having entered its Order Confirming

JUDGMENT AGAINST RIVERWALK ON THE COLUMBIA, LLC - 1

Exhibit D

1 Arbitration Award and Granting Entry of Judgment Against Riverwalk on the Columbia, LLC,
2 now therefore:

3 The Port of Camas/Washougal is granted a judgment against Riverwalk on the Columbia,
4 LLC in the amount of \$412,066 for attorneys' fees and \$195,786.67 for costs and expenses, for a
5 total Judgment of \$607,852.67, with post-judgment interest to accrue at 12% per annum until
6 paid.

7 DATED: August ____, 2009.

8
9 Superior Court Judge

10
11 PRESENTED BY:

12
13
14 D. Jeffrey Courser, WSB No. 15466
15 Louis A. Ferreira, WSB No. 20646
16 Of Attorneys for the Port of Camas/Washougal

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Exhibit D

JUDGMENT AGAINST RIVERWALK ON THE COLUMBIA, LLC - 2