IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

WEST LINN-WILSONVILLE SCHOOL DISTRICT 3JT, a political subdivision of the State of Oregon, Plaintiff, v. THE CITY OF WEST LINN, OREGON, a municipal entity, Defendant.	Case No. 22CV06982 REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant the City of West Linn (the "City") submits the following reply to *Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment* ("*Response*") and in further support of *Defendant's Motion for Summary Judgment* ("*Motion*"). This *Reply* is supported by the ongoing records and files herein, together with the supporting declaration of Christopher K. Dolan ("*Dolan Dec.*"), the declaration of Rory Bialostosky ("*Bialostosky Dec.*"), and the supplemental declaration of Edward Trompke ("*Trompke Supp. Dec.*") filed herewith.

Introduction

"(C)heat" and "swindle" and "biased" and "surreptitiously" and "collusion" and "secret instruction" and even "Machiavellian." These are all buzz words employed by the District to color the City's role in securing a joint appraisal. They are nothing more than an appeal to emotion and certainly false characterizations made all the more egregious by the duplicity with which the District has operated. There are no genuine issues of material fact in the record in dispute and the City is entitled to summary judgment on the District's claims.

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Analysis

1. Reply to the District's Statement of Material Facts

a. Letter of Intent

The District clearly misstates the scope and purpose of the of the parties' August 16, 2021, Letter of Intent ("LOI").

The District points out that "the LOI did not include any term suggesting the Chapter XI designation would be used to affect the appraisal." *Response*, P. 5, Ll. 15-16. Related to that claim, the District argues that "(t)he PSA contained a revised version of the appraisal process outlined in the LOI(,)" including a "term * * *(that) was not a deal point in the LOI," and that "raises a substantial issue of whether this ***surreptitiously inserted term*** was actually intended by the parties." *Response*, P. 10, L. 23 to P. 11, Ll. 22. (Emphasis added.)

The terms of the LOI are, respectfully, largely irrelevant. That is because the LOI provided only a preliminary framework for the parties' January 10, 2022, *Real Estate Purchase and Sale Agreement* ("PSA"). That cannot be disputed because the LOI expressly stated: "This Letter of Intent ***is intended to be for preliminary discussion purposes and not be binding with respect to the sale of the Property***." *J. Williams Dec.*, ¶2, Ex. 1. (Emphasis added.) Moreover, the District's charge of a "surreptitiously inserted term," is baseless. (In other words, it does not create a ***genuine*** issue of material fact.) On this point, the LOI expressly stated: "The Agreement shall include, ***but shall not be limited to***, the following terms and conditions(.)" *Id.* That is, the LOI expressly contemplated, and the parties were put on actual notice, that there would be additional terms.

Here, the purposed offending term was not hidden from the District's review. It was included on the first page of the PSA and in the same font and font size as all of the other terms and conditions. It was not kept secret. Moreover, the PSA was "reviewed by the District's legal counsel, Miller Nash, LLP and found to be acceptable to the District." *Bialostosky Dec.*, ¶6, Ex. 1.

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Finally, within its recitation of facts pertaining to the LOI, the District argues: "The parties' contemporaneous communications were clear that the District wanted to sell the property for $6,5000,000." *Response*, P. 5, Ll. 18-20. What the Districted "wanted" is also irrelevant (and frankly, self-serving). If the District wanted to sell the property for $6.5 million, it could have insisted that that term be included in the non-binding LOI, which it signed, and it absolutely should have required that it be included in the binding PSA, which it signed. It did neither. Instead, the District agreed, and thus intended, that the value of Oppenlander would be determined by the appraisal process expressed in the PSA. *See Ryan v. Western Pac. Ins. Co.*, 242 Or 84, 90 (1965) ("We have a policy of interpreting the intent of the parties to a contract according to the language of the contract.") This fact cannot be in dispute: the District stated in its January 10, 2022, proposed District Resolution 2021-08:

> **FURTHER RESOLVED**, by the authority vested in it under Oregon law and Board Policy DID, the Board does hereby approve the sale of the Property according to the terms and conditions specified in the Agreement, ***including without limitation at a price determined using the Fair Market Value as further defined and described in the Agreement***(.)

Bialostosky Dec., ¶7, Ex. 2.

The District knowingly assumed the risk that the appraised value would be less than $6.5 million just as the City equally assumed the risk that the appraised value would be more than $6.5 million. This too cannot be in dispute. At its January 10, 2022, public meeting, the District's Board Chair admitted:

> I'm thinking about the risk that both parties take in doing this. ***It's not without its risks***. But definitely I think both parties are being responsive to what we heard from the public about the desire to try and keep this land.

Bialostosky Dec., ¶5. (Emphasis added.)

The District's allegation of surreptitious (that is "secret') behavior is baseless.

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b. Prior Dealings

The District claims that "(b)ased on prior dealings, the District believed the inclusion of Chapter XI language would not reduce the purchase price." *Response*, P. 5, Ll. 22-23. This was not, however, a term of the PSA, and indeed, it is directly contrary to terms of the PSA, assented to by both parties, which expressly and unambiguously allowed the joint appraiser to consider "all limitations on the permitted use of the Property made as a condition of (the) sale." *J. Williams Dec.*, ¶4, Ex. 2. The purported prior dealings are extrinsic evidence which may not be used to add, subtract, or vary the terms of a contract (let alone a fully integrated contract). *See Hyland v. Oregon Agr. Co.*, 111 Or 212, 217 (1924) ["(E)vidence extrinsic to the writing itself, is inadmissible for the purpose of adding to, subtracting from, altering, varying, or contradicting the terms of the written contract or to control its legal operation or effect(.)"]

c. Purported Instructions to Joint Appraiser

i. Mr. Trompke was duty bound to zealously represent the City.

In October of 2019, when attorney Edward Trompke was in preliminary discussions with Sam Romanaggi, Mr. Trompke had a duty to zealously represent only his client—the City, and at that time the PSA had not been executed in any event.

Subsequent to execution of the LOI, Mr. Trompke repeatedly reached out to the District to determine if the parties would consent to a joint appraiser—including Mr. Romanaggi. That undeniable fact is already in the record. On December 2, 2021, with the appraisal deadline fast approaching, Mr. Trompke reached out (again) to the District's attorney, James Walker, and advised:

> We need to get the PSA signed, ***and the appraisal started***. The city will hare [*sic.*] an appraiser, in that ***the District has been unable to respond*** to our ***requests*** for names ***and consent to one the city selected***.

Trompke Dec., ¶2, Ex. 1, P. 3. (Emphasis added.) Thus, prior to entering into the PSA, (1) the District was not cooperating with the selection of a joint appraiser, and (2) the District had

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already been made aware that the City had already selected Mr. Romanaggi (whether as the City's sole appraiser or, if the District was inclined, a proposed joint appraiser).

Note that this e-mail communication was sent at 8:42 P.M. on December 2, 2021. *Id.* Mr. Trompke does not mention Sam Romanaggi by name. *Id.* Just over an hour later, Mr. Walker, on behalf of the District, agreed to "using Romanaggi Valuation Services (RVS) for the appraisal." *Id.* at P. 2. Thus, it is clear Mr. Walker was aware of Mr. Trompke's selection of Mr. Romanaggi before December 2, 2021. At that time (and at no time thereafter) did Mr. Walker make any inquiry of Mr. Trompke as to the contents of Mr. Trompke's conversations with Mr. Romanaggi. *Trompke Supp. Dec.*, ¶4. Had Mr. Walker asked Mr. Trompke about such discussions, Mr. Trompke would advise him of any non-work product discussions. *Id.* Of course, the District could have then decided not to proceed with Mr. Romanaggi, but the parties will never know because the District did not ask and Mr. Trompke was still duty bound to his client—only.

The October discussions with Mr. Romanaggi occurred prior to any agreement on who, if at all, the joint appraiser would be, Mr. Trompke was duty bound to secure the best deal for only his client. Indeed, Mr. Trompke would have violated that duty if he advocated for a higher price—all for the benefit of the District. Any argument that Mr. Trompke's October discussions with Mr. Romanaggi was inappropriate—when there was ***no agreement*** in place on the selection of a joint appraiser—simply fails to account for Mr. Trompke's duty to zealously represent his client in that moment and under those circumstances.

ii. Mr. Trompke did not "instruct" Mr. Romanaggi.

The District argues that Mr. Trompke instructed Mr. Romanaggi to appraise Oppenlander at a low value. What Mr. Trompke stated, however, was not an instruction, but a simple truism: "(t)he [C]ity wants lower value." Well of course it did—it was the buyer! And what was the result of this self-servingly described "secret instruction"? Mr. Romanaggi addressed that at his deposition, under oath and under penalty of perjury:

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Q. Okay. And in the last sentence, Mr. Trompke tells you, quote, the city wants lower value to get voters to approve a bond to buy it, end quote. Did I read that properly?

A. Yes.

Q. What did you take Mr. Trompke's email to you to mean?

A. That he needs me to do an appraisal. He needs somebody to do an appraisal. I don't know if he's talking to other ones -- other people too.

Q Okay. What about the statement that the city wants lower value? ***Did that impact your appraisal of the property?***

A. No.

Zahniser Dec., ¶3, Ex. 2. (Emphasis added.)[1]

The District points to former Mayor Walters and Councilor Jones's concerns related to Mr. Trompke's statements to Mr. Romanaggi. Those concerns do not render Mr. Trompke's dealings with Mr. Romanaggi inappropriate. For instance, as the District points out, former Mayor Walters indicates that "the city council (did not direct) city staff to ***ask*** for a low – lower value to get voters to approve the bond." *Zahniser Dec.*, ¶2, Ex. 1. Mr. Trompke, as indicated above, did not "ask" for a lower value. In any event, Mr. Romanaggi did not allow that to influence his appraisal. Thus, Councilor Jones's concern over a biased appraisal also did not come to fruition.

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[1] Mr. Romanaggi was obligated to testify truthfully. It is presumed that "(t)he law has been obeyed." OEC 311. Unless or until the District tenders admissible evidence that Mr. Romanaggi perjured himself, then it is presumed he testified truthfully, and the only evidence before this court is that Mr. Romanaggi was, in fact, ***not*** influenced by Mr. Trompke's innocuous statement.

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iii. The District Took Steps to Influence Mr. Romanaggi.

The ***only*** statement the District takes exception to is Mr. Trompke's statement that the City wants "lower value."[2] But, can there be any genuine doubt that the District wanted to keep the value of the Property high? Even if the District had done nothing, that would still be true. Here, however, the District was proactive in attempting to influence Mr. Romanaggi. This fact is also already in the record. On December 2, 2021, when the District agreed to Mr. Romanaggi serving as the joint appraiser, Mr. Walker informed Mr. Trompke: "The District would also like to submit to the appraiser purchase offers submitted to the District in June 2021." *Trompke Dec.*, ¶2, Ex. 1. Mr. Trompke did not object. *Trompke Supp. Dec.*, ¶3. In fact, the District did provide Mr. Romanaggi with all of the materials the District considered important. Mr. McGough reported to the Board:

> The District and City agreed on a mutual appraiser. That appraisal is in progress. The District has provided the appraiser all of the information, historical information that they need to make that appraisal.

Bialostosky Dec., ¶4.

iv. There is no evidence that the Romanaggi appraisal was biased or flawed.

The District suggests that Mr. Romanaggi's appraisal is flawed because the District has several offers to purchase the property in the millions of dollars. First and foremost, the Court should refuse to admit Mr. McGough's testimony on this point. *See Defendant's Motion to Strike Inadmissible Evidence* ("*Motion to Strike*"), Pp. 2-3. Even if the Court were to allow this

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[2] The District argues that it was "unaware of the ***extensive*** communications between Mr. Trompke and Mr. Romanaggi." *Response*, P. 10, Ll. 9-10. (Emphasis added.) There is no evidence that the communications between Mr. Trompke and Mr. Romanaggi were extensive. In fact, the District immediately confirms thereafter that the only communication between Mr. Trompke and Mr. Romanaggi that it calls into question is that "the City desired low value." *Id.* at Ll. 11. Hyperbole is not a defense to summary judgment.

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evidence, the District's evidence seeks an apples to oranges comparison.

Mr. McGough testified that these offers were submitted by "residential developers." *McGough Dec.*, ¶8. It can reasonably be concluded that these offers were made with the understanding that the residential developers would then proceed with actual development of the property. There is no evidence that these offers would still be in the millions of dollars (let alone that any offer would be made at all) if these prospective purchasers (who are developers) would only be allowed to develop the property if it could convince the voting residents of West Linn to change West Linn's Chapter XI designation—the very condition under which the District agreed to sell Oppenlander to the City. This is another example of the District's duplicity: It demands that the City pay a developer's price yet under the condition that the Property not be developed.

The District then complains that Mr. Romanaggi "had no experience appraising property subject to a Chapter XI designation." *Response*, P. 12, Ll. 6-7. If this was a genuine concern to the District, it should have inquired about Mr. Romanaggi's qualifications prior to selecting him as the joint appraiser. The District should not be allowed to place the consequences of ***its*** failure to do ***its*** own due diligence on the City's shoulders.

More baffling is the fact that this appears to be a belated argument by the District, having previously conceded: "The School District did not object to Romanaggi's ***qualifications*** to perform the appraisal to determine fair market value." *Complaint*, ¶23. (Emphasis added.) There is no ***genuine*** issue of material fact in dispute.

Regardless, the District's argument misses the fundamental point: The parties agreed that Oppenlander would not be developed, and Mr. Romanaggi's appraisal was based on the fact that Oppenlander would be preserved as park or open space as intended. *Romanaggi Dec.*, 4. On that point, Mr. Romanaggi ***is*** experienced:

> Q. Okay. Is it safe to say that you don't have any experience, other than the Oppenlander project that brings us here, you've never appraised a piece of property that was subject to a Chapter XI designation?

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A. Well, isn't Chapter XI specific to City of West Linn?

Q. Correct.

A. And I just told you that I haven't done work for West Linn in the past.

Q. Correct.

A. Okay.

Q. So you have no experience appraising property that is subject to a Chapter 11 designation, correct?

A. Correct.

Q. What is your prior experience appraising parks for any municipality?

A. Appraising a park. I've done a number of appraisals where it's either for a park or open space. ***Probably at least ten times***.

Dolan Dec., ¶2, Ex. 1, Pp. 15-16.

Alternatively, the District suggests that it is the "non-permanent nature of the designation," that is the missing element of Mr. Romanaggi's valuation. Again, however, that is not true. Mr. Romanaggi testified:

Q. Okay. The land use that's allowed is park or open space. My question now becomes, in your mind, in this appraisal, do you assume that that land use that is allowed as park or open space is a permanent encumbrance on title?

A. Well, that's a bit of an interesting term, permanent, because again it's kind of like land use laws or zoning laws or tax laws, they're permanent until they change. Now, the likelihood of them changing is unlikely. But we basically do it based upon how most perceived invest -- investors or buyer would look at a property, you know. So as of right now that's what it is, and it's unlikely it would change.

Dolan Dec., ¶2, Ex. 1, P. 58.

In point of fact, a zone change would only require a vote of the West Linn Council. Here, the Chapter XI designation makes it even harder as it would require approval by West

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Linn's voters.

The District has offered no expert opinion on the validity of Mr. Romanaggi's appraisal. Nor has the District identified any failure on Mr. Romanaggi to comply with the Uniform Standards of Professional Appraisal Practice. Moreover, for reasons unknown, the District chose not to offer into evidence the appraisal its represents that it has, nor any subsequent appraisal. Notwithstanding all of this, the District seeks to establish that the valuation is flawed by pointing out the process employed by Mr. Romanaggi. Primarily, the District takes exception to the comparables used by Mr. Romanaggi (without identifying any comparables he should have used). Mr. Romanaggi explained the basis for his comparables at his deposition:

> Q. Let's talk about your comparables.
>
> A. Okay.
>
> * * *
>
> Q. Comparable 1. A sale that occurred in September 2017. An 11.6 acre vacant parcel located on an island in the Clackamas River. It's accessible only by boat, or possibly wading in low water times. It is non-buildable, other than a yurt is possible, and there are no utilities. That's your first comparable.
>
> A. Uh-huh.
>
> Q. To 11 flat acres in West Linn that has unfettered street access, utilities, water, electric, sewer. Your first comparable is an island in the middle of the Clackamas River. Do you find that an accurate comparable?
>
> A. What do you mean by an accurate comparable?
>
> Q. How is an island in the middle of the Clackamas River at all comparable to Oppenlander Field?
>
> A. As we wrote here, it brackets the lower range of value. Everything is comparable to either superior or inferior or similar. So this, being at $2500 an acre, and we concluded

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at 12 -- what was it? $12,000 an acre, it's inferior. That's how it compares.

Q. Okay. The next comparable. 2016 sale. Six acre parcel. Nearly all of the property has slopes with greater than 25 percent or else floodplains, wetlands along Abernethy Creek, and the development of the site would be extremely difficult or impossible. So you -- this is Comparable No. 2. You compared this, an impossible land to develop, to ten acres of flat land in West Linn that has utilities and street access.

A. Well, the utilities don't matter. It's non-developable. That's the whole point.

Q. And why is it non-developable?

A. Pardon?

Q. Why is it non-developable?

A. We've discussed this already.

Q. Because of the Chapter 11 designation?

A. Because of the Chapter 11 designation and the hypothetical condition.

Q. But if I remove the Chapter 11 designation, then it is developable.

A. If you remove the chap -- the chap -- then you have a different appraisal report -- assignment.

Q. But my question is, did you take into account the removability of the designation when valuing the property?

A. No, because we have a hypothetical condition.

Q. And hypothetical conditions are set in stone? They can't be -- they take into account the flexibility of the condition being removed?

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A. We have a concept called speculation. Nobody knows what's going to happen to anything far into the future. So we're looking at today's marketplace, and what you have, and maybe even the holding period of an asset. You know, we factor those kind of things. But as a hypothetical condition, they're just saying what's the property -- what's the value of this property as park, open space, non-developable land. So if we look at comparable sales, you know, we want to find properties that are non-developable. Now, typically you don't have a situation like you have in this potential transaction that was appraised. So trying to find willing buyer, willing seller, market transactions of non-developable land, it's -- simply put, it's difficult.

Q. You know that --

A. If we had better comparables, then we would use those.

Q. So Comparable 3.

A. Okay.

* * *

Q. Comparable 3 has no legal access or utilities, can only be accessed from the river. There's a fire pit and a camping platform. And factors development of this comparable would be -- the above factors development of this comparable would be extremely difficult. And so this is another comparable, in your mind, that you used to value the ten acres known as Oppenlander Fields.

A. Right.

Q. Okay. Comparable 4. The site consists of a steep ravine and it's considered non-buildable. The development of this comparable would be extremely difficult, and the highest and best use is considered to be recreation. And you considered this steep ravine, non-buildable site to be a comparable to Oppenlander Field.

A. It was comparable in respects to whether it was inferior or superior to its subject, and in this case whether its topography was inferior or superior to its subject. If in this case it's

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inferior, then you would hazard the guess that you might pay more for a piece of flat land than you would for a piece of land that's sloped, all things being equal.

Q. Comparable 5. Roughly rectangular shaped. It's pasture/hay land, almost entirely in wetlands in a floodplain. Development of this comparable would be more challenging. And it's been purchased for conservation purposes. And you compared that to Oppenlander Field.

A. Yes.

Q. Comparable 6 is in wetland.

A. Yes.

Q. Comparable would be more challenging. And the City of Portland purchased the property for wetland enhancement. And yet at the end you say, on balance, this sale is considered similar to the value of the subject, and its sale price of $12,658 per acre is considered to bracket the close to immediate upper range of the value. Why is this wetland that the city purchased for wetland enhancement establishing the -- in close proximity to the airport establishing an upper range of value for Oppenlander?

A. Well, did you read the analysis portion?

Q. Oh, I read your narrative.

A. Okay. Well, the wetlands require an upward adjustment, and some noise nuisance, downward adjustment for its smaller size, then on balance. We conclude that it was immediate upper range. So, yeah, adjustments going both directions in that case.

Q. Okay. A wetland in proximity to the airport is comparable -- is considered the upper range comparable to Oppenlander. In fact, according to your analysis, this wetland in the shadow of PDX airport is on a per acre basis more valuable than Oppenlander, because Oppenlander you only valued at 120,000. It's ten acres.

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A. Right.

Q. Okay.

A. So we're not talking about the -- in this case it's part of the smaller acreage, and also when you have open space is -- part of it is just having a view amenity, which is a value as well, if you're looking at open space.

Q. Another comparable, Comparable 7.

A. Yeah.

Q. You say the property slopes steeply, a 20 percent slope. It's recorded as a protected open space by a homeowners association and is not developable. And you use this as a comparable, correct?

A. Yes.

Q. In fact, it's 13,000 per acre. In fact, according to your own analysis, this comparable of un-developable, steeply sloped land is more valuable on a per acre basis than Oppenlander because this is 13,000 per acre. Yeah? Is that your testimony?

A. Yes.

Dolan Dec., ¶2, Ex. 1, Pp. 66-69, 71-75.

The District has offered no credible evidence that the process and comparables used by Mr. Romanaggi was defective. The District argues:

> Critically, the City's own representatives concede the so-called comparables Mr. Romanaggi used were incomparable to Oppenlander field.

Response, P. 13, Ll. 18-19. The District provided no evidence that the City's representatives were qualified to address the comparables used by Mr. Romanaggi. Consider, for instances, former Mayor Walters deposition testimony on cross-examination:

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Q. * * * I'd like to ask you, first of all, are you a licensed appraiser yourself.

A. No.

Q. Have you ever done any appraisal work?

A. No.

Q. Are you familiar with the Uniform Standards of Professional Appraisal Practice?

A. No.

Q. Okay. For the Oppenlander matter, did you yourself happen to pull and analyze any other comparables that were not in Mr. Romanaggi's report?

A. No.

Q. Are you familiar with the criteria that Mr. Romanaggi used to select his comparables?

A. No.

Dolan Dec., ¶3, Ex. 2, P. 185.

The District quotes Councilor Relyea who testified that he was "'surprised' and "felt that was a low value.'" *Response*, P. 13, Ll. 23-24. But that testimony was in response to Mr. Romanaggi's finding that the value of Oppenlander was $120,000. *See Zahniser Dec.*, ¶6, Ex. 5, P. 60. The District has offered no evidence into the record that that Mr. Relyea conceded anything. The same holds true with the District's reference to Councilor Jones's deposition testimony: he was referring only to Mr. Romanaggi's conclusion, not the comparables. *See Zahniser Dec.*, ¶5, Ex. 4, P. 59.

In any event, the undisputed fact is that neither the former Mayor nor any of the council members quoted by the District are in a position to provide an opinion as to the actual value of Oppenlander (or at the very least, there has been no effort to qualify them to do so). Under Oregon law, a witness offering testimony as to the value of property must be "an expert witness

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or as one having special knowledge of the value of the property," *State by and through Highway Commission v. Assemble of God, Pentecostal, of Albany*, 230 Or 167, 177 (1962), or be an owner of the property. *Id.* at 178.

2. Reply to Legal Analysis

a. There was no collusion between the City and Mr. Romanaggi

As shown above, Mr. Trompke did not collude with Mr. Romanaggi via "secret" communications or otherwise. The fact that the District suggests that there was collusion and that there were secret communications does not raise a ***genuine*** issue of material fact because those arguments are inconsistent with the evidence in this summary judgment record:

- Mr. Trompke's communications with Mr. Romanaggi occurred between the execution of the LOI and PSA;
- The LOI was not a contract and it was expressly non-binding;
- The fact that Mr. Trompke was in preliminary communications with Mr. Romanaggi was not a secret, and that was made known to the District, *see Trompke Supp. Dec.*, ¶4;
- Both the LOI and the PSA provided for a scenario where each party would retain their own appraiser, and Mr. Trompke's October communications with Mr. Romanaggi were entered into under this scenario;
- Mr. Trompke had a duty to zealously represent the City when he was seeking a City-only appraiser and the communications with Mr. Romanaggi would have been protected work product not subject to disclosure;
- Mr. Trompke did not instruct Mr. Romanaggi to issue a low value appraisal, rather he only stated the obvious—the purchaser was looking for a low value;
- Mr. Romanaggi, in any event, did not allow that statement to influence his appraisal;
- The District was not only provided the opportunity to submit to Mr. Romanaggi whatever materials it wanted to (without objection or opposition), it, in fact, did so, including, apparently, offers to purchase the

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property in the millions of dollars—all certainly in an effort to persuade Mr. Romanaggi; and

- The District was never precluded from speaking with Mr. Romanaggi.

b. The District *is* attempting to rewrite the contract

The District is correct that prior dealings may constitute "circumstances underlying a contract," but the evidence of prior dealings offered by the District is offered to contradict an express and unambiguous term of the PSA: the parties were allowed to select a joint appraiser "to conduct an appraisal of fair market value of the Property, taking into consideration all factors as such appraiser, in its professional discretion deems relevant, including * * * all limitations on the permitted use of the Property made as conditions of the sale." *J. Williams Dec.*, ¶4, Ex. 2. The only relevant purpose of the prior course of dealings is to strip the joint appraiser of this contractually provided discretion to consider the Chapter XI designation. Clearly, the District is attempting to impermissibly rewrite the PSA. The District is not entitled to the declaratory relief it seeks based on this scheme.

c. There is no evidence of fraud

The purported nexus of District's proposed evidence of prior dealings to Mr. Trompke's communications with Mr. Romanaggi are patently absurd. the District argues:

> Moreover, because Mr. Trompke's communications with Mr. Romanaggi predated the District's signing of the PSA, extrinsic evidence of the District's understanding of the engagement is critical to showing that the District would not have otherwise executed the contract.

Response, P. 20, Ll. 8-11.

That argument make no sense. Had Mr. Trompke breached his duty of confidentiality to the City and disclosed his protected communications with Mr. Romanaggi, the District could have simply chose not to accept him as the joint appraiser. There is no evidence that the District would have scuttled the entire deal.

/ / /

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d. There are no "vagaries" in the PSA

As indicated above, the undisputable evidence establishes that the District executed the PSA knowing full well that the appraiser had be given express instructions in the PSA concerning the Chapter XI designation. It does not matter who "inserted" the clause—it was agreed upon by both parties. There is not ambiguity.

The appraiser was also allowed to consider all encumbrances on title. The District argues that there were not encumbrances on title, and therefore, apparently, this creates an ambiguity. It does not. It refers only to a harmless mistake—it had no effect on the appraisal and there is no evidence that it did. In any event, none of the parol evidence offered by the District assists the Court in explaining the non-ambiguity.

The District then argues (with absolutely no evidence to support it) that "* * * Mr. Romanaggi created a 'hypothetical condition' (presumably per Mr. Trompke's instruction since it is not stated in the PSA) that, at the time of the appraisal, Oppenlander Park *was already designated under* Chapter XI." *Response*, P. 21, Ll. 22-24. (Emphasis in the original.) The District's argument that the post-sale requirement to designate Oppenlander is not a "condition of sale," is a tortuous interpretation at best. The City agreed to designate the Oppenlander as open space under Chapter XI—if it had not agreed to do so, there is no dispute that the sale would not have happened. Whether the action to so designate took place before the closing of escrow or after does not change the fact that it was a condition of the sale.

e. There is no evidence of breach of contract

The District raises two arguments: The first is that "the City breached the Joint Appraiser clause by how it hired and interacted with Mr. Romanaggi synonymous with its good faith and fair dealing argument(.)" *Response*, P 22, n. 2. As established above, there was no breach of the Joint Appraiser clause. The District position is derived simply out of seller's remorse. Likewise, as pertaining to the District's second argument, it is clear the District waived the deadline for the appraisal. Nothing in any of the District's proffered parol evidence addresses that point.

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f. There is no evidence of breach of the implied duty of good faith and fair dealing

The District has done a thorough job of twisting the facts. As argued above, Mr. Trompke was acting on behalf of his client at the time he was in contact with Mr. Romanaggi as expressly contemplated by the PSA which allowed the parties to secure their own appraisals. The District has offered not a shred of evidence (nor is there any) that there was any inappropriate collusion. In fact, it appears that the District failed to conduct its own due diligence and now simply wants to lay blame on the City's attorney for not bailing it out.

Conclusion

The District states:

> * * * (T)he City moves for summary judgment arguing (1) that there is no genuine dispute of material fact that the appraisal process followed the strictures of the Purchase and Sale Agreement; (2) that District's reading of the PSA requires evidence prohibited by the parol evidence rule; (3) that the District waived its objections to the timeliness of the appraisal; and (4) that the District's good faith and fair dealing claims do not raise genuine issues of fact.

Response, P. 2, Ll. 6-11.

The District is correct. The District, however, is wrong when it then adds: "All of these arguments are unavailing." *Response*, P. 2, L. 12.

The appraisal process was strictly adhered to. The discussions between Mr. Romanaggi and Mr. Trompke predated the PSA and once the parties agreed to retain Mr. Romanaggi, Mr. Trompke stopped interacting with Mr. Romanaggi as the City's appraiser. Up until the parties agreed to use Mr. Romanaggi as a joint appraiser, Mr. Trompke had a duty to secure an appraisal and to protect his confidential communications. There is no evidence in the record that contradicts this, and thus there is no evidence that the City breached its implied duty of good faith and fair dealing. The District simply has seller's remorse. Even if the communications were somehow improper (although there is not evidence of this), the only evidence in the record

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of Mr. Romanaggi's testimony that his valuation was not affected by the communication. There was no harm to the District.

To the extent the District wishes to introduce parol evidence (e.g. the LOI) and prior dealings that expressly contradict the parties' unambiguous and fully integrated contract, that evidence must be disallowed. Even if it is allowed, it cannot override the express and unambiguous terms of the PSA.

The District executed the PSA after the deadline for the appraisal. None of the evidence tendered by the District (admissible or otherwise) changes the fact that the District understood and implicitly agreed that the deadline was not a material term. In other words, the District waived this condition. Even if the City had colluded with Mr. Romanaggi (and that clearly did not happen), that purported collusion would have no effect on the timeliness of the report. Indeed, that delay in getting the report out was a result of the District's belated agreement to retain Mr. Romanaggi.

The City has established that there are no genuine issues of material fact in dispute, and it is entitled to summary judgment as a matter of law.

DATED this 30th day of December, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the date shown below, I served a true and correct copy of the foregoing REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT on:

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***EMAIL SERVICE AGREEMENT**

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DATED: December 30, 2022.

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