

NO. 34842-0-II

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

CO. of 11/11/09
11/11/09 11:09
[Handwritten signature]

TRINITY LAND DEVELOPMENT, L.L.C., a Washington limited
liability company,

Respondent,

v.

SUNRISE DEVELOPMENT CORPORATION OF
WASHINGTON, a Washington Corporation,

Appellant.

BRIEF OF APPELLANT

TOUSLEY BRAIN STEPHENS PLLC
Michael D. Daudt, WSBA 25690
1700 Seventh Avenue, Ste 2200
Seattle, WA 98101
(206) 682-5600

WIGGINS & MASTERS, P.L.L.C.
Charles K. Wiggins, WSBA 6948
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033

Attorneys for Appellant

TABLE OF CONTENTS

INTRODUCTION 1

ASSIGNMENTS OF ERROR..... 2

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 3

STATEMENT OF THE CASE 4

A. Sunrise agreed to sell Trinity a 20 acre portion of Sunrise’s master planned community in Pierce County..... 4

B. The trial court found that neither Trinity nor Sunrise knew when they signed the PSA that Pierce County might require a tax segregation of the 20 acres before accepting Trinity’s Plat application. 9

C. The trial court found that Sunrise also agreed to obtain a tax segregation of the 20 acre parcel from the rest of Sunrise’s property. 11

D. Pierce County had not processed the tax segregation by the deadline for Trinity to file a preliminary plat application, and a County land use planner told Trinity that the County would not accept the application until the segregation was complete..... 15

E. In reliance on the provision that the PSA would become null and void if Trinity failed to meet the plat filing deadline, Sunrise declared that the PSA was terminated..... 19

F. Statement of procedure..... 20

SUMMARY OF ARGUMENT 22

ARGUMENT 24

A. The findings and evidence fail to support the trial court’s conclusion that Sunrise waived compliance with the 60 day deadline to file the preliminary plat application by missing the 30 day deadline for supplying a correct legal description, where Sunrise neither intended nor communicated any intention to waive. 24

B. The findings and evidence fail to support the trial court's conclusion that Sunrise was estopped from holding Trinity to the 60 day deadline to file the preliminary plat application where: Sunrise never said it would accept late performance; Trinity knew Sunrise would not accept late performance; and Trinity did not rely on the actions of Sunrise..... 33

C. The trial court erred in finding that Sunrise breached the duty of good faith because the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract. 38

D. Trinity's duty to file the plat application was both a duty and a condition precedent, the failure of which excused Sunrise from any further performance under the PSA..... 43

E. Sunrise is entitled to recover its attorney fees and costs..... 47

CONCLUSION 47

TABLE OF AUTHORITIES

STATE CASES

<i>Allied Sheet Metal [Fabricators, Inc. v. People's Nat'l Bank]</i> , 10 Wn. App. [530] 535-36, [518 P.2d 734, rev. denied, 83 Wn.2d 1013, cert. denied, 419 U.S. 967 (1974)].....	40
<i>Alsens America Portland Cement Works v. Degnon Contracting Co.</i> , 222 N.Y. 37, 118 N.E. 210 (1917)	25
<i>American Safety Casualty Insurance Co. v. City Of Olympia</i> , 133 Wn. App. 649, 137 P.3d 865 (2006).....	25
<i>Amoco Oil Co. v. Ervin</i> , 908 P.2d 493 (Colo. 1995).....	41
<i>Artz v. O'Bannon</i> , 17 Wn. App. 421, 562 P.2d 674, rev. denied, 89 Wn.2d 1008 (1977).....	28
<i>Badgett v. Security State Bank</i> , 116 Wn.2d 563, 807 P.2d 356 (1991).....	39, 40, 41, 42
<i>Barrett v. Weyerhaeuser Co. Severance Pay Plan</i> , 40 Wn. App. 630, 700 P.2d 338 (1985)	39
<i>Berg v. Ting</i> , 125 Wn.2d 544, 886 P.2d 564 (1995).....	45
<i>Betchard-Clayton, Inc. v. King</i> , 41 Wn. App. 887, 707 P.2d 1361, review denied, 104 Wn.2d 1027 (1985).....	39
<i>Bowman v. Webster</i> , 44 Wn.2d 667, 669, 269 P.2d 960 (1954).....	26, 28, 32
<i>CHG International, Inc. v. Robin Lee, Inc.</i> , 35 Wn. App. 512, 667 P.2d 1127, review denied, 100 Wn.2d 1029 (1983).....	27, 39
<i>Cavell v. Hughes</i> , 29 Wn. App. 536, 629 P.2d 927 (1981).....	40

<i>Creeger Brick & Building Supply Inc. v. Mid-State Bank & Trust Co.</i> , 385 Pa. Super. 30, 560 A.2d 151 (1989).....	40
<i>Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.</i> , 86 Wn. App. 732, 935 P.2d 628 (1997)	41, 42
<i>Harrison v. Puga</i> , 4 Wn. App. 52, 480 P.2d 247, 46 A.L.R.3d 415 (1971).....	27
<i>Jones Assoc. [v. Eastside Props., Inc.]</i> 41 Wn. App. [462,] 466, 704 P.2d 681 [(1985)].....	44
<i>Local 112, I.B.E.W. Building Association v. Tomlinson Dari-Mart, Inc.</i> , 30 Wn. App. 139, 632 P.2d 911, <i>rev. denied</i> , 96 Wn.2d 1017 (1981).....	27
<i>Long v. T-H Trucking Co.</i> , 4 Wn. App. 922, 486 P.2d 300 (1971).....	40
<i>Lonsdale v. Chesterfield</i> , 99 Wn.2d 353, 662 P.2d 385 (1983).....	39
<i>Martin v. Seigel</i> , 35 Wn.2d 223, 212 P.2d 107 (1949)	45
<i>Martinson v. Cruikshank</i> , 3 Wn.2d 565, 101 P.2d 604 (1940).....	45
<i>Matson v. Emory</i> , 36 Wn. App. 681, 676 P.2d 1029 (1984).....	39
<i>Mayer v. Pierce County Medical Bureau</i> , 80 Wn. App. 416, 909 P.2d 1323 (1995)	41
<i>Metropolitan Park District v. Griffith</i> , 106 Wn.2d 425, 723 P.2d 1093 (1986)	39
<i>Mike M. Johnson, Inc. v. Spokane County</i> , 150 Wn.2d 375, 391, 78 P.3d 161 (2003)	26
<i>Mid-Town Ltd. Partnership v. Preston</i> , 69 Wn. App. 227, 848 P.2d 1268, <i>rev denied</i> , 122 Wn.2d 1006 (1993).....	25, 26

<i>Miller v. Othello Packers, Inc.</i> , 67 Wn.2d 842, 410 P.2d 33 (1966).....	39
<i>Reed v. Eller</i> , 33 Wn. App. 820, 664 P.2d 515, <i>rev. denied</i> , 99 Wn.2d 1015 (1983)	27
<i>Reynolds Metals Co. v. Electric Smith Construction & Equipment Co.</i> , 4 Wn. App. 695, 483 P.2d 880 (1971)	25
<i>Ross v. Harding</i> , 64 Wn.2d 231, 391 P.2d 526 (1964).....	43, 44
<i>Tacoma Northpark, LLC v. NW, LLC</i> , 123 Wn. App. 73, 96 P.3d 454 (2004)	43
<i>Taliesen Corp. v. Razore Land Co.</i> , 135 Wn. App. 106, __ P.3d __ (2006)	34
<i>Teller v. APM Terminals Pac., Ltd.</i> , 134 Wn. App. 696, 142 P.3d 179 (2006)	33
<i>Tomlinson v. Clarke</i> , 118 Wn.2d 498, 825 P.2d 706 (1992)	27
<i>University Properties, Inc. v. Moss</i> , 63 Wn.2d 619, 388 P.2d 543 (1964).....	27
<i>Vacova Co. v. Farrell</i> , 62 Wn. App. 386, 814 P.2d 255 (1991).....	32
<i>Washam v. Pierce County Democratic Central Committee</i> , 69 Wn. App. 453, 849 P.2d 1229 (1993).....	24

STATE STATUTES

RCW 64.04.010	45
---------------------	----

OTHER AUTHORITIES

5 Samuel Williston, <i>A Treatise on the Law of CONTRACTS</i> , § 663, at 127 (Walter H.E. Jaggeed. 3rd ed.1961)). <i>id.</i> at 79	44
---	----

ORDINANCES

Pierce County Code Title 19 5

INTRODUCTION

Appellant Sunrise Development Corp. (Sunrise) entered into a Real Estate Purchase and Sale Agreement (PSA) to sell an undeveloped 20 acre parcel of land to respondent Trinity Land Development (Trinity). The PSA required Trinity to file a preliminary plat application by a date certain, providing that if Trinity missed the deadline, the PSA “shall be null and void” Ex. 1 ¶ 8. Trinity missed the deadline.

The trial court granted specific performance to Trinity on two theories neither pled nor argued by Trinity—that Sunrise waived the null and void date by failing to meet a different deadline under a different part of the PSA; and that Sunrise was estopped from relying on the null and void date. The trial court also found that Sunrise had breached the duty of good faith by not working with Trinity to extend the null and void date.

The evidence, the findings and the law fail to support any ground for specific performance and the Court should reverse.

ASSIGNMENTS OF ERROR

The trial court erred in entering the following findings of fact (“FF”) and conclusions of law (“CL”):¹

1. FF 10, CP 424.
2. FF 11, CP 424.
3. FF 15, CP 425.
4. FF 16, CP 425.
5. FF 28, CP 427.
6. FF 33, CP 428.
7. FF 35, CP 428.
8. FF 36, CP 429
9. FF 41, CP 429-30.
10. CL 6, CP 431, that “[e]vasion of the spirit of the bargain may constitute a breach of the duty of good faith and fair dealing.”
11. CL 9, CP 431-32 on reliance and detriment.
12. CL 11, CP 432, on waiver.
13. CL 14, CP 432, that Sunrise undertook an additional obligation to segregate the parcel outside of the PSA.

¹ A copy of the initial findings and conclusions is Appendix A and is incorporated by this reference.

14. CL 15, CP 432-33, regarding Trinity's failure to file the preliminary plat application.

15. CL 16, CP 433, that Sunrise was obligated in good faith to work with Trinity to extend the deadline for filing the preliminary plat application.

16. FF 2, CP 458 (5/5/06),² that with specific performance, Sunrise will be receiving payment sooner than under the PSA, and that specific performance places the parties in the same position they would have had the transaction closed under the PSA.

17. The trial court erred in ordering specific performance. CP 560.

18. The trial court erred in awarding attorney fees to Trinity. CP 560.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did Sunrise waive the condition that the PSA would become "null and void" if Trinity failed to timely file the preliminary plat application where Sunrise had no existing right to waive and neither intended nor communicated any intention to waive?

² A second set of findings was entered following the second phase of trial, is attached as Appendix B, and is incorporated by this reference.

2. Is Sunrise equitably estopped from holding Trinity to the “null and void” date in the PSA where Sunrise never said it would grant any extension to the null and void date, Trinity knew that Sunrise would not accept late performance, and Trinity did not rely on the actions of Sunrise?

3. Does the duty of good faith implied in every contract obligate a party to accept a material change in the terms of the contract?

4. Was Trinity’s duty to file the preliminary plat application a condition precedent, the failure of which excused Sunrise from any further performance under the PSA?

5. Should Sunrise be awarded attorney fees and costs as the prevailing party on appeal?

STATEMENT OF THE CASE

A. Sunrise agreed to sell Trinity a 20 acre portion of Sunrise’s master planned community in Pierce County.

Appellant Sunrise Development Corporation owns undeveloped real property located in Pierce County. FF 3, CP 423. The property is located within the Sunrise Master Plan Community. *Id.* The Pierce County Code provides that a “Master Planned Community” is “an approved planned unit development which

integrates a mix of housing, services and recreation and is located within an urban growth area.” Pierce County Code Title 19, Appendix A, Glossary.

Sunrise agreed to sell to Trinity Land Development, LLC, a portion of Sunrise’s property at least 20 acres in size. FF 5, CP 423. The property was a portion of a 288 acre parcel³, and Sunrise had not yet obtained a legal description for the property. FF 5, CP 423.

Harry Corliss purchased Sunrise in the 1980’s. Ex. 68 p.6.⁴ Harry never built on the property, but has sold parts of it. *Id.* at 6. He originally owned all stock in Sunrise Development, but subsequently placed it in a trust for the benefit of his family. *Id.* at 7. The beneficiaries of the trust include Harry’s adult sons, Scott and Tim, and their wives. *Id.* But Harry Corliss manages the corporation and makes final decisions on behalf of the corporation. Ex. 75 at 7.

Sunrise retained Carl Halsan to sell some of their property for cash flow purposes. RP 58. Halsan is a self-employed real

³ The entire Sunrise Development is 1467 acres. RP 53.

⁴ Exhibits 67, 68, 74 and 75 are excerpts of depositions offered as substantive evidence and admitted by the trial court. RP 611, 614-15.

estate consultant. RP 52. He has worked with Sunrise on a variety of projects as well as its master planned community. RP 53. Halsan began meeting with Trinity to negotiate terms of purchase between Trinity and Sunrise. RP 55-56. Although Halsan had authority to negotiate, he did not have authority to agree to any particular terms of the transaction. RP 69-70.

Trinity is owned and operated by Clark McGowan and his son Ryan. RP 10-11. Ryan McGowan and Halsan met with Harry Corliss in early April 2003. RP 12-13, 58-59. For the rest of the month, Halsan shuttled back and forth between the Corlisses and the McGowans, working out the terms of a purchase agreement. RP 61-62. During this process, the Corlisses and the McGowans never met, but relied on Halsan to carry information back and forth. RP 26, Ex. 75, Harry Corliss Dep. 24-25, Scott Corliss Dep. at 30.⁵

Sunrise and Trinity selected a specific parcel of property bounded by roads and a school, and close to 20 acres in size. RP 64. At 20 acres, the sale could be completed without the formal subdivision process, but if it were under 20 acres, subdivision

⁵ Sunrise included portions of the depositions of Harry Corliss and Scott Corliss in Ex. 75. The Court admitted these deposition extracts at RP 610-11. Counsel is also designating as part of the Clerk's Papers these extracts of the Corliss depositions.

would be required. RP 64-65. Sunrise fixed a selling price at \$120,000 per acre, gross. RP 69, 80-81, 84. Trinity wanted to reduce the price because some of the land was not buildable, but Sunrise refused. RP 70-71.

Trinity proposed setting the closing date for the sale upon preliminary plat and engineering approval, plus additional time for appeal periods if necessary. RP 114. Sunrise insisted, however, on an outside limit on the closing date. RP 114. Ultimately, the PSA called for closing one year after Trinity removed its feasibility contingency: “In any event this transaction shall close on or before twelve (12) months of removal of feasibility contingency”, subject to up to three 30 day extensions. Ex. 1, ¶10.⁶

Trinity drafted the PSA based on its discussions with Halsan. RP 293. After incorporating Sunrise’s changes, Trinity drafted the final version of the PSA. RP 296. Trinity maintained control of the entire drafting process. RP 310. Harry Corliss signed the PSA on behalf of Sunrise, and Clark McGowan on behalf of Trinity. Ex. 1.

The PSA gave Trinity 30 business days, until June 11, 2003, to perform a feasibility study. Ex. 1, §6; FF 6, CP 423. Trinity

⁶ A copy of the PSA is Appendix C of this brief.

would then have 60 business days from removal of the feasibility contingency until September 4, to file an application for a preliminary plat. Ex. 1, §8. The PSA further provided, that if Trinity failed to file the preliminary plat by that date, then the PSA would be “null and void.” *Id.*; FF 8, CP 424. The PSA also included a provision that, “[t]ime is of the essence of this Agreement.” Ex. 1, §15. A.

At the time they executed the PSA, the parties still lacked an exact legal description for the property. Accordingly, the PSA provided, “Correct Legal Description for 20 acre parcel to be provided by the seller herein prior to removal of feasibility study as per item 6 herein.” Ex. 1, Ex. “A”.

Sunrise did not provide a correct legal description to Trinity by June 11, the date for removing the feasibility contingency. FF 7, CP 424. Clark and Ryan McGowan discussed whether they should remove the feasibility contingency and deposit \$50,000 cash as the earnest money without the legal description. RP 27-28. Halsan had told the McGowans that Scott Corliss was extremely unhappy about the sale because he felt that the property had been sold too cheap. RP 297-98. Halsan told Clark McGowan that in light of Scott’s unhappiness, Trinity should be very mindful of the deadlines

in the PSA. RP 112. Accordingly, Trinity decided to go ahead and waive the feasibility contingency, paid the \$50,000 earnest money deposit, and reminded Sunrise to provide a legal description for the property. Ex. 4.

Sunrise promptly asked its engineering firm to prepare a legal description. RP 235. The engineer sent the legal description to the title company on June 27, 2003, 16 days after removal of the feasibility contingency. RP 233-34, Ex. 6.

B. The trial court found that neither Trinity nor Sunrise knew when they signed the PSA that Pierce County might require a tax segregation of the 20 acres before accepting Trinity's Plat application.

The PSA says nothing about tax segregation of the parcel to be sold to Trinity. Ex. 1. The term "segregation" does not even appear in the PSA. The purpose of tax segregation is to facilitate the process of assessing property taxes in an efficient and appropriate manner. RP 582. Tax segregation also facilitates collection of the real estate excise tax upon sale of the property. RP 595. The actual division of the property is accomplished by recording a deed with a sufficient legal description. RP 581-82. Although the tax segregation assigns a number to the new parcel, it does not actually divide the property. RP 582.

Sunrise gave no thought to the issue of segregation when the PSA was negotiated. Harry Corliss testified, "I think I leave that up to the real estate guy or salesman." Ex. 68, p. 17. Scott Corliss didn't even know the meaning of legal segregation. Ex. 75, Scott Corliss Dep. at 27.

Clark McGowan testified that he had never previously done a segregation. RP 399. Clark McGowan admitted that he did not know that Pierce County would not accept a plat application without a separate tax segregation parcel number until 7 to 10 days before September 4, Ex. 75 at 141-42, i.e., about four months after signing the PSA. Ryan McGowan testified similarly. Ex. 74 at 25-27.

Based on this testimony, the trial court stated in his oral decision that the key question is whether the parties knew when they entered into the PSA that a tax segregation parcel number was required in order to file preliminary plat application. RP 709. The court concluded that there is little question if any that Trinity did not know that a tax segregation was required. *Id.* He similarly concluded that Sunrise did not know that a tax segregation was required before filing the preliminary plat application. RP 709-10.

Trinity's counsel drafted, and the trial court signed, FF 41 that, "[t]hrough September 2003, both parties believed that Trinity

Land could not submit the preliminary plat application to Pierce County without the subject property first being segregated from the larger parcel.” CP 429-30 (emphasis in original). As to Trinity, the only appropriate reading of this finding is that Trinity believed in late August that a segregation was required to file the plat application. But there is no evidence that Sunrise ever believed that segregation was necessary in order to file the plat application, and the evidence does not support the interpretation that the parties believed that to be the case when they signed the PSA.

C. The trial court found that Sunrise also agreed to obtain a tax segregation of the 20 acre parcel from the rest of Sunrise’s property.

The trial court found, “The parties did not intend that the purchase and sale agreement would include all the terms of their agreement regarding the subject property.” FF 10, CP 424. The trial court further found, “The parties agreed that Sunrise Development would have the duty of having the subject property segregated from its larger parent parcel of 288 acres.” FF 11, CP 424. These findings are unsupported by the evidence, but they do not affect the outcome because Sunrise did apply for segregation of the property.

No one testified that the parties “did not intend that the purchase and sale Agreement would include all of the terms of their agreement regarding the subject property”, as FF 10 states. Although the PSA did not include an integration clause, one would normally expect a written agreement to purchase real property to include all terms of the agreement, and, in any event, any additional terms would have to be in writing.

Nor is there any evidence of an additional agreement outside the PSA. There is no evidence that either Harry or Scott Corliss entered into such an agreement. RP 291, 300. Rather, the only evidence is that Carl Halsan told Trinity that Sunrise would have to segregate the parcel. RP 63, 67-68.

But the evidence was also that Halsan had no authority to enter into any agreement on behalf of Sunrise. Halsan testified that he had the authority to negotiate, and to carry information back and forth, but not to agree to any specific terms. RP 69-70. Ryan McGowan testified that Halsan said that, “he [was] a representative of Sunrise with authority from Harry to discuss terms with us about this property and the sale of this property.” RP 16. Halsan told Trinity he did not have authority to agree to terms on Sunrise’s behalf. RP 113. Clark McGowan, principal of Trinity, admitted in

his deposition that Halsan did not have the authority to speak on behalf of Sunrise. Ex. 75, p. 49-50. If Trinity had "countered a key provision, such as price, acreage, timing, [Halsan] would be under the duty to report that back to the Corlisses." RP 70. Neither Ryan McGowan or anyone else testified that Halsan told them that he had authority to agree to terms on behalf of Sunrise.

In any event, Halsan testified that he probably told the Corlisses that the property had to be segregated, and that Sunrise was the one that would segregate the parcel. RP 82, 85.

There was no testimony that Halsan or anyone else agreed to perform the segregation by any date prior to the final closing of the transaction. FF 11 says nothing about a date by which Sunrise was to segregate the property. Halsan believed that the deadline for segregation was prior to closing, *i.e.*, no later than one year after Trinity waived the feasibility contingency. RP 117-18. Since there was no specific deadline for segregation, other than the fact that it had to be accomplished prior to closing, Halsan waited until Trinity waived the feasibility contingency before submitting a segregation request. RP 125-26.

Nor did Clark McGowan testify to any agreement outside of the PSA. Rather, Clark testified that he believed that the duty to

segregate arose from Sunrise's obligation to provide a correct legal description set out in Appendix A to the PSA. RP 300-01, 317-19, 323-24. But, as discussed below, the trial court did not accept this testimony as true, finding that any agreement about segregation was outside the PSA. RP 708-10.

Once feasibility was waived, Halsan took it upon himself to start the segregation process. RP 91-92. Either Halsan or someone else contacted a surveyor on June 23 and asked him to come up with a legal description and a segregation request. RP 92. The segregation request was dated June 26, was signed by Harry Corliss on July 7, Ex. 8, and was filed on July 9. RP 236. The County segregated the property in February 2004. FF 16, CP 425.

Based on this testimony, the trial court stated in his oral decision that it was clear that Halsan was going to obtain a tax segregation because "[h]e thought this would be useful or necessary to close the transaction." RP 710. The Court concluded that Halsan didn't give "a whole lot of thought" to whether it would be necessary for preliminary plat approval, and that, "this was not something that they particularly bargained about. That's clear to me. And they didn't." RP 710.

- D. Pierce County had not processed the tax segregation by the deadline for Trinity to file a preliminary plat application, and a County land use planner told Trinity that the County would not accept the application until the segregation was complete.**

Carl Halsan thought that the segregation would take five to six months. RP 152-53. Accordingly, he had no expectation that the segregation would be complete by September 4, the deadline for Trinity to file the plat application, which was less than two months after Halsan submitted the segregation request.

Trinity retained engineer Rich Larson to prepare the application for preliminary plat approval. FF 22, CP 426. Larson is an experienced engineer and familiar with the preliminary plat application process in Pierce County. FF 25, CP 426. Larson believed that Pierce County would not accept a preliminary plat application until the property had been segregated and assigned its own parcel number. FF 24, CP 426. Larson told Clark McGowan that the County would not accept the preliminary plat application unless the segregation had been completed. FF 27, CP 426-27. McGowan told Larson to check with Sunrise. RP 168.

Larson contacted Sunrise and learned that the segregation request had been submitted, but had not been completed. RP 168-

69. Larson then told McGowan that the request was in progress.
Id.

Larson's employee Bill Diamond met with Pierce County Planning and Land Services ("PALS") planner Steve Kamieniecki to discuss the plat application. FF 29, CP 427. Kamieniecki told Diamond that the preliminary plat application could not be submitted until the property had been segregated.⁷ FF 31, CP 427. McGowan told Larson to do nothing further. RP 351.⁸

As it turns out, Pierce County had an unwritten exception to the property segregation requirement. FF 34, CP 428. Pierce County would accept preliminary plat applications for Master Planned communities, and PALS would have accepted the application under this exception. *Id.* But Trinity did not learn about this exception until after the September 4 deadline had passed and Sunrise had declared the PSA null and void. *Id.*

⁷ FF 33, CP 428, incorrectly (and speculatively) states that Kamieniecki would have rejected a plat application filed without a tax parcel number. Kamieniecki testified that he would make inquiries before taking action. RP 257-58.

⁸ FF 28 says that McGowan told Larson to submit the application anyway. This is contrary to McGowan's own testimony at RP 351, and is unsupported by any evidence.

McGowan initially believed that Larson's office had attempted to file the application, but that the application had been reviewed and denied as incomplete. RP 349-50. McGowan subsequently learned to the contrary, that no one even tried to file the plat application. RP 347-48.

There was ample testimony from County employees that the plat application would have been accepted without completion of the tax segregation. Carolyn Salsberry is the supervisor of the PALS permit counter which handles all applications for all of the department which require permits. RP 429-30. Salsberry testified that an applicant may use the parent parcel number on a plat application if the segregation request is in the works, and that was the pattern and practice in 2003. RP 432. Salsberry did not know of any plat application that had ever been turned away because the segregation request was filed but not completed. RP 436.

Janet Ungers is the property segregation supervisor for Pierce County. RP 450. Unger testified that there are times of the year when the County does not do segregations, specifically from the first part of May until sometimes as long as October. RP 459. Unger also testified that in 2003, the assessor's office was converting to a new computer system and did no segregations from

the first or second week of May until the first week of August. RP 460, 462. When they resumed processing segregations, their backlog was probably five to six months. RP 463. Segregations are normally processed first in, first out, but they make exceptions if the tax payer is going to lose financing or is a potential buyer who needs the property segregated more quickly. RP 463-64. The assessor's office could possibly have processed the segregation request by the end of August if Trinity had requested that it be expedited.⁹ RP 466-67.

Trinity took none of these steps. RP 351-52. It did not attempt to submit the plat application under the parent parcel number. It did not ask the County to accelerate the request. Trinity did nothing. Clark McGowan testified that he did nothing further because, "[i]t was the seller's duty to provide me with a correct legal description, a segregation, a parcel number, and to document it that

⁹ Ungers' testimony shows that FF 16, CP 425, incorrectly says that it "normally" takes approximately 60 days to process a segregation request. As Ungers testified, the seasonal nature of processing the requests means there is no "normal" period, and ignoring the seasons, the time can vary from a few weeks to several months. RP 460. In any event, because the County stopped processing applications from the first week of May until the first week of August, with a five to six month backlog when it resumed processing, RP 460, 462, 463, the Sunrise segregation request would not have been processed by the County by September 4 without a request to expedite even if Sunrise had filed the segregation application on April 29, the day the parties signed the PSA.

they would owe me the additional time.” RP 351. But McGowan did not tell Halsan any of this. RP 352. Nor did he tell the Corlisses. *Id.*

E. In reliance on the provision that the PSA would become null and void if Trinity failed to meet the plat filing deadline, Sunrise declared that the PSA was terminated.

The PSA provides that, “[t]ime is of the essence of this Agreement.” Ex. 1, § 15.A. The PSA also declares that it will become null and void if Trinity does not apply for preliminary plat approval within 60 business days of waiving feasibility:

Purchaser agrees to make application for said Preliminary Plat and or PDD within sixty (60) business days of the date of the removal of the feasibility contingency noted in Paragraph 6 of this agreement. In the event Purchaser does not meet this deadline, then this agreement shall be null and void, unless otherwise extended by mutual agreement of both Seller and Purchaser, AND all earnest money deposited under this agreement shall be returned to the Purchaser except for Fifty Thousand and no/100th Dollars (\$50,000.00) non-refundable paid to Seller upon removal of feasibility contingency as per Paragraph 6.

Ex. 1, § 8.

When Trinity failed to file the preliminary plat application by September 4, Sunrise sent Trinity a letter declaring the PSA null and void:

Seller has not, and will not agree to extend the deadline for making the necessary application. Therefore Purchaser’s failure to make application in accordance with the requirements of Paragraph 8 of the Purchase Agreement

has caused the Purchase Agreement to become null and void.

Pursuant to Paragraph 8 Seller will retain the \$50,000 non-refundable deposit.

Ex. 10. The parties met on September 10 to discuss their dispute, FF 39, CP 429, but Sunrise adhered to its position that the original PSA is terminated. Ex. 11. The parties continued to discuss their differences, e.g., Ex. 12 and 20, but Sunrise asserted consistently that the agreement was null and void. FF 42, CP 430.

F. Statement of procedure.

Trinity commenced this action for specific performance and damages. CP 1. Trinity's theory has always been that the PSA required Sunrise to segregate the 20 acre parcel as part of the obligation to obtain a legal description for the property. CP 2-3. When Sunrise moved for summary judgment, CP 91, Trinity argued in response that Sunrise's obligation to provide a legal description of the property included the obligation to legally segregate the property. CP 121. The trial court denied summary judgment. CP 299.

Trinity's trial memorandum argued again that Sunrise's contractual obligation to provide a legal description of the property included segregating the property from the larger tract. CP 313.

Trinity's counsel argued in closing that the obligation to obtain a correct legal description includes the obligation to segregate the property. RP 639.

The trial court rejected Trinity's argument that the PSA required Sunrise to segregate the property: "There was the agreement with respect to doing something to segregate the 20 acres from the 288-acre parcel that was strictly speaking outside the limits of Exhibit 1, and that part is pretty clear." RP 708. The Court also rejected Trinity's argument that the parties agreed that the segregation must occur before Trinity's application for filing the plat application. RP 709-10.

Having rejected Trinity's theory, the trial court found, "Well, it seems, to me, that based on Mr. Halsan's determination to get a segregation outside the contract, they agreed that it would be the defendant's responsibility to get the segregation and the tax parcel ID that goes along with that." RP 711. The trial court concluded that the PSA was enforceable for several reasons: Sunrise waived the "time is of the essence" clause by its failure to provide the legal description before Trinity waived the feasibility contingency, RP 717; PALS planner Kamieniecki gave Larson's employee "misinformation" which was a calamity for both parties, RP 721, and

both sides had a duty of good faith “to try to solve this mutual calamity, Mr. Kamieniecki’s misinformation.” RP 723. Sunrise breached its duty of good faith by not making that effort. *Id.* The written conclusions of law, but not the oral decision, added the conclusion that Sunrise was estopped from relying on the “time is of the essence” provision. CP 431-32.

The parties had initially agreed to bifurcate the trial between liability and damages. RP 5. After the trial court ordered specific performance in the initial phase of trial, Trinity proposed that it should have 30 days after the entry of judgment to pay the purchase price and close the transaction. CP 458. The trial court granted Trinity’s request. CP 457. The trial court entered a judgment for specific performance, and awarded attorney fees and costs of \$97,965. CP 560. This appeal followed.

SUMMARY OF ARGUMENT

Trinity’s theory through trial was that Sunrise was obligated to obtain a segregation of the property before the deadline for Trinity to file its preliminary plat application, or alternatively, even before June 11, end of the feasibility period. Trinity argued that when the parties agreed that Sunrise would provide a correct legal description by June 11, this necessarily obligated Sunrise to

segregate the property by June 11. This was the theory in Trinity's complaint, CP 1-5, Trinity's opposition to Sunrise's motion for summary judgment, CP 134-48, Trinity's trial brief, CP 319-21, and Trinity's closing argument. RP 629-30, 633-35, 651-52.

The trial court rejected Trinity's argument. The court concluded that neither party intended that providing a legal description included tax segregation of the property. RP 708-10. Rather, the court concluded that Sunrise agreed "outside the limits" of the PSA to provide a correct legal description. RP 708. Since there was no deadline as part of this "outside the limits" agreement, Sunrise did not breach this side agreement. RP 709-10. Instead, the trial court found that Sunrise waived any reliance on the "time is of the essence" paragraph and breached a duty of good faith. RP 717, 723.

Trinity did not argue waiver and the evidence does not support waiver.

Trinity's counsel added to Trinity's proposed conclusions of law that Sunrise was equitably estopped from relying on the "time is of the essence" paragraph. The trial court adopted this proposed conclusion, despite the fact that Trinity never pled or argued equitable estoppel and the trial court did not find equitable estoppel

in its oral decision. The evidence does not support equitable estoppel.

Finally, the trial court found that Sunrise breached the duty of good faith by failing to attempt to "solve this mutual calamity, Mr. Kamieniecki's misinformation", i.e., the mistaken advice that the preliminary plat application could not be filed without a tax segregation. RP 723. This was error because the duty of good faith does not add any additional terms or duties to a contract; it simply obligates a party to carry out the party's duties in good faith.

ARGUMENT

- A. The findings and evidence fail to support the trial court's conclusion that Sunrise waived compliance with the 60 day deadline to file the preliminary plat application by missing the 30 day deadline for supplying a correct legal description, where Sunrise neither intended nor communicated any intention to waive.**

The trial court concluded: "Sunrise Development waived strict insistence regarding the essence of time in the agreement by failing to comply with the June 11, 2003 deadline for providing a correct legal description." Conclusion of Law ("CL") 11, CP 432. Neither the findings nor the evidence support this conclusion, which is erroneous.

Legal issues are reviewed by this Court de novo. *Washam v. Pierce County Democratic Cent. Comm.*, 69 Wn. App. 453,

459, 849 P.2d 1229 (1993), *rev. denied*, 123 Wn.2d 1006 (1994).

Where the alleged waiver is based on established facts that are not disputed, the existence of waiver is a conclusion of law:

"Waiver" and "estoppel" are essentially legal conclusions to be drawn from established facts. Where the issue is what inference shall be drawn from facts where the evidence thereon is not in serious dispute, it is reviewed on appeal as a conclusion of law.

Mid-Town Ltd. P'ship v. Preston, 69 Wn. App. 227, 232, 848 P.2d 1268, *rev denied*, 122 Wn.2d 1006 (1993). The burden of proof rests with the party claiming waiver. **American Safety Cas. Ins. Co. v. City Of Olympia**, 133 Wn. App. 649, 657, 137 P.3d 865, (2006). Waiver becomes an issue of fact only where the evidence permits a difference of opinion: "[w]hen facts proved without dispute require the exercise of reason and judgment, so that one reasonable mind may infer that a controlling fact exists and another that it does not exist, there is a question of fact." *Id.*, quoting **Reynolds Metals Co. v. Electric Smith Constr. & Equip. Co.**, 4 Wn. App. 695, 701, 483 P.2d 880 (1971) (quoting **Alsens Am. Portland Cement Works v. Degnon Contracting Co.**, 222 N.Y. 37, 118 N.E. 210 (1917)).

This Court recently held in **American Safety**, *supra*, "waiver may be implied by the party's conduct, but waiver by conduct,

'requires unequivocal acts of conduct evidencing an intent to waive.'" *Id.* at 656-57 (quoting ***Mike M. Johnson, Inc. v. Spokane County***, 150 Wn.2d 375, 391, 78 P.3d 161 (2003)). The requirement that waiver requires proof of unequivocal acts or conduct evidencing an intent to waive can be traced back to the definition of waiver by the Supreme Court in ***Bowman v. Webster***.

A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive. It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego some advantage. The right, advantage, or benefit must exist at the time of the alleged waiver. The one against whom waiver is claimed must have actual or constructive knowledge of the existence of the right. He must intend to relinquish such right, advantage, or benefit; and his actions must be inconsistent with any other intention than to waive them.

44 Wn.2d 667, 669, 269 P.2d 960 (1954).

The courts have generally not found waiver of deadlines in a purchase and sale agreement. In ***Mid-town Limited P'ship v. Preston***, *supra*, the trial court found a waiver of the closing date based on the fact that the seller had agreed in writing to one extension of time, and after the extended closing date had provided written certification that the Board of Directors of the seller had approved a motion to proceed with the closing of the sale. 69 Wn.

App. at 230-31. The Court of Appeals reversed, holding that the seller's agreement to extend the initial closing date did not waive the requirement to close on the extended date, and that any conduct by the seller after the extended closing date could not prove a waiver of the closing date. *Id.* at 233-34. *Accord*, **University Properties, Inc. v. Moss**, 63 Wn.2d 619, 388 P.2d 543 (1964); **CHG International, Inc. v. Robin Lee, Inc.**, 35 Wn. App. 512, 667 P.2d 1127, *rev. denied*, 100 Wn.2d 1029 (1983); **Local 112, I.B.E.W. Bldg. Ass'n v. Tomlinson Dari-Mart, Inc.**, 30 Wn. App. 139, 632 P.2d 911, *rev. denied*, 96 Wn.2d 1017 (1981).

By contrast, the courts have found waiver in real estate purchase and sale agreements where the seller accepts late payments over a period of time, thereby waiving strict adherence to the payment due dates. *E.g.*, **Reed v. Eller**, 33 Wn. App. 820, 826, 664 P.2d 515, *rev. denied*, 99 Wn.2d 1015 (1983) *overruled on other grounds*, **Tomlinson v. Clarke**, 118 Wn.2d 498, 512, 825 P.2d 706 (1992) (“[I]n the face of repeated late payments, silence on the part of a vendor may reasonably lead a vendee to believe that time of performance will not be rigidly enforced.”); **Harrison v. Puga**, 4 Wn. App. 52, 61, 480 P.2d 247, 46 A.L.R.3d 415 (1971) (“When a contract payee accepts late payments without objection

as to their timeliness, he impliedly leads the payor to believe that late payments will be accepted and thus waives the time for payment condition specified in the contract.”) But there is no waiver if the seller never misleads the buyer into believing that the seller will accept late payments. **Artz v. O'Bannon**, 17 Wn. App. 421, 426, 562 P.2d 674, *rev. denied*, 89 Wn.2d 1008 (1977) (“The evidence viewed in a light most favorable to the defendants does not support the contention that defendants waived the time limit or misled plaintiffs into believing an extension would be granted.”)

Applying these principles to this case, the evidence and the findings fail to support the trial court’s conclusion of waiver. The waiver conclusion conflates four different paragraphs of the PSA:

- ¶ 6 required Trinity to satisfy the feasibility contingency within 30 business days or else the PSA would terminate;
- ¶ 8 required Trinity to file the preliminary plat application within 60 business days or the PSA would become “null and void”;
- ¶ 15.A provided that “time is of the essence of this agreement” and that the PSA would be “null and void” unless accepted by both parties by April 30, 2003;
- Appendix A required Sunrise to provide a correct legal description “prior to removal of feasibility study as per item 6 herein.”

One can only waive an existing right. **Bowman**, *supra* at 669. But until Trinity satisfied feasibility, Sunrise had no right to require Trinity to file the preliminary plat application at all, let alone on any

specific date. And the 60 business day deadline was not set until Trinity actually satisfied feasibility. Thus, as of June 11 Sunrise had no existing rights under ¶ 8 and could not have waived any rights under ¶ 8.

Even if Sunrise had had existing rights under ¶ 8, the trial court did not find that Sunrise waived its rights under ¶ 8. Rather, the court found that Sunrise waived its rights under ¶ 15.A, the “time is of the essence” clause. CL 11, CP 432. But ¶ 8 rendered the PSA “null and void” quite apart from the “time is of the essence” clause. Neither the doctrine of waiver nor the evidence supports a “double” waiver theory that by breaching Appendix A, Sunrise waived ¶ 15.A, which in turn waived ¶ 8.

In the typical waiver case, the claim is that the seller has excused late payments in the past, leading the buyer to believe that late payment is permitted, or has waived a closing date by agreeing to extensions of the closing date. None of these cases support the conclusion that by failing to meet one contract deadline Sunrise waived a completely different express deadline imposed on Trinity.

Not only is it counter-intuitive, the waiver theory is contrary to the evidence. It is undisputed that Scott Corliss was unhappy that Halsan presented the deal and the paperwork to Harry Corliss

without keeping Scott fully informed. RP 562. Scott Corliss wanted to keep all multi-family zoned properties, and was unhappy that Halsan had not openly discussed the sale so that a proposed PSA could be reviewed by an attorney before signature. RP 562-63. Scott also believed that the price was too low. Ex. 75 Scott Corliss Dep. at 24. Scott Corliss testified that although he could not "kill the deal", he did determine to watch the deadlines carefully:

Q: Did you then try to find a way to make this deal not happen?

A: There's nothing I could do to make the deal not happen. There was not an escape clause in the contract.

Certainly there were time lines that had to be met by Trinity and Clark and Ryan. I scratched down on a piece of paper one of the time lines that they had to meet, which was to make application within 60 days of the end of their feasibility, I think.

...

There was nothing I could do to kill the deal though. It was a purchase and sale agreement that my father had signed, and there's nothing I could do about it at that point except wait.

Ex. 75 Scott Corliss Dep. at 24-25.

Not only is it undisputed that Scott Corliss was unhappy with the PSA, it is also undisputed that both Clark and Ryan McGowan learned that Scott was unhappy. Clark McGowan testified that during the feasibility period Halsan told him that Scott had "gone

ballistic" when he learned that Harry had signed the PSA. RP 297. This made Clark "defensive" about carefully meeting all of the deadlines in the PSA. *Id.* During the feasibility period, Clark learned that part of the property was not buildable and asked Halsan about the possibility of a price adjustment. RP 297-98. Halsan advised Clark not to try to change anything because Scott believed that Sunrise was selling the property too cheaply. RP 298.

As the deadline approached for Trinity to satisfy the feasibility contingency and deposit \$50,000 for the earnest money, Clark and Ryan McGowan discussed whether they should satisfy the contingency and deposit the earnest money when Sunrise had not yet provided the required legal description. RP 40-41, 297. Knowing that the Corlisses were dissatisfied, the McGowans did not want to give them any reason to cancel the PSA, and decided to satisfy the feasibility and deposit the \$50,000 even without Sunrise having provided the required legal description. RP 27-28, 41. The McGowans simply reminded Sunrise of its obligation to provide the legal description. *Id.*, Ex. 4.

In short, there is not a scintilla of evidence that Sunrise intended to voluntarily waive Trinity's compliance with the deadlines in the PSA. The evidence is directly to the contrary and Trinity was

fully aware that Sunrise intended to rigidly hold Trinity to Trinity's deadlines in the PSA. There was no "intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right." *Bowman, supra*, at 669.

The contractual deadline for Trinity to file a preliminary plat application was an important negotiated term of the PSA. It was not the role of the trial court to use the doctrine of waiver to relieve Trinity of the consequence of Pierce County's delay in processing the segregation request or of the consequence of Kamieniecki's incorrect advice about filing the plat. *Vacova Co. v. Farrell*, 62 Wn. App. 386, 405, 814 P.2d 255 (1991) (Court declined request by purchaser of property "to 'rewrite' his contract with Vacova in order to grant a reasonable period of grace for the payment of the first earnest money installment (and also the second)."). Sunrise did not waive Trinity's obligation to file the plat application and the trial court erred in finding waiver.

- B. The findings and evidence fail to support the trial court's conclusion that Sunrise was estopped from holding Trinity to the 60 day deadline to file the preliminary plat application where: Sunrise never said it would accept late performance; Trinity knew Sunrise would not accept late performance; and Trinity did not rely on the actions of Sunrise.**

Conclusions of law 8 and 9 state that Sunrise is equitably estopped from relying on the "time is of the essence" clause because Sunrise failed to provide the correct legal description of the property by June 11. CP 431-32. Trinity did not plead equitable estoppel and the trial court did not find equitable estoppel in the oral decision. Nor does the evidence or the findings support equitable estoppel.

This Court recently reiterated the well accepted elements of equitable estoppel:

Washington courts do not favor equitable estoppel, and a party asserting it must prove each of its elements by clear, cogent, and convincing evidence. [citation omitted] The elements are: (1) an admission, statement, or act inconsistent with a claim afterward asserted; (2) an action by another in reasonable reliance on that act, statement, or admission; and (3) injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement, or admission.

Teller v. APM Terminals Pac., Ltd., 134 Wn. App. 696, 712, 142 P.3d 179 (2006). Failure to prove any one of these elements by clear, cogent and convincing evidence is fatal to Trinity's claim and

Trinity fails to prove all three. Moreover, since Trinity neither pled nor argued equitable estoppel, it was not a triable issue in the case. ***Taliesen Corp. v. Razore Land Co.***, 135 Wn. App. 106, 134, ___ P.3d ___ (2006).

The first element of equitable estoppel is not satisfied by any admission or statement because Sunrise made no admission or statement inconsistent with adhering to the “null and void” date in ¶ 8 of the PSA. Nor is it satisfied by an “act.” Although Appendix A to the PSA required Sunrise to provide a correct legal description by the end of the feasibility period, the PSA did not spell out any resulting consequences of delayed performance. Sunrise had no reason to think that the delay would have any consequences—Trinity had 60 business days to complete and file the plat application, and could easily do so if the correct legal description was provided shortly after June 11. Moreover, Sunrise had a good reason not to spend the funds on a surveyor to provide a legal description during the feasibility period. Trinity was free to walk away from the PSA at any time without consequence and there was no reason to pay the surveyor until the waiver of feasibility. RP 122.

By contrast, the requirement of ¶ 8 that Trinity file the plat application within 60 business days was integral to timely completion of the PSA. Sunrise had deliberately negotiated a shortened schedule for closing the transaction, RP 114, and filing the plat application in a timely fashion was essential to meeting the PSA deadline to close within one year after removal of the feasibility contingency. Ex. 1 ¶ 10.B. This date, like the other dates in the PSA, was a negotiated point. RP 311. More to the point, ¶ 8, unlike Appendix A, called for a draconian result if Trinity missed the plat filing deadline: the PSA would become “null and void, unless otherwise extended by mutual agreement of both Seller and Purchaser” In short, there is nothing inconsistent about Sunrise missing a deadline in Appendix A to which the parties had not attached any consequences, and Sunrise enforcing the express provision of the PSA that if Trinity missed the deadline for filing the plat application, the PSA would become null and void.

Nor is the second element of equitable estoppel satisfied under the facts of this case because it cannot be said that Trinity acted “in reasonable reliance” on Sunrise’s delay in providing a legal description when Trinity missed the plat deadline. As discussed above, Trinity never relied on Sunrise’s delay, instead

carefully observing the feasibility removal deadline. RP 27-28, 40-41, 297. Clark McGowan testified that he believed that Sunrise would extend the deadline for filing the plat application, not because Sunrise was late in providing a legal description,¹⁰ but because he felt that Sunrise had a duty to provide a legal segregation: “I believe their duty was to extend the deadline because they hadn’t done their duty regarding segregation of the parcel.” RP 353. Because of Sunrise’s alleged duty to provide the segregation, Clark believed that Sunrise would agree to an extension of time for filing the plat: “I believe that they would be obligated to extend the deadlines as a result of their duty to provide me the parcel number for plat application.” RP 307-08. This testimony was the basis for FF 36 that Sunrise would provide an extension. CP 429.

Clark McGowan’s testimony establishes that Trinity did not rely on the fact that Sunrise had been 16 days late in providing the correct legal description as the basis for concluding that Sunrise would excuse Trinity’s failure to meet the plat filing deadline. Rather, Trinity relied on a different theory, that Sunrise was late in

¹⁰ Sunrise had provided the legal description only 16 days after Trinity satisfied the feasibility contingency. RP 233-34, Ex. 6.

providing a segregation of the property, an obligation that the trial court found arose outside the PSA. Thus, Trinity did not rely, and could not reasonably have relied, on Sunrise's 16 day delay to justify not timely filing the plat application.

In any event, it was not reasonable for Clark McGowan to believe that Sunrise would extend the September 4 deadline, as recited in FF 36, CP 429. The PSA required Sunrise to join in any action necessary to effect the preliminary plat, and to sign any necessary application documents. Ex. 1, ¶ 7. But neither Clark nor anyone else asked Sunrise to do anything to expedite the segregation process or to help in filing the plat application. RP 351-52. It was unreasonable for Clark and Trinity to sit back and do nothing while the clock ticked and the deadline for filing the plat application approached. Trinity had a duty of good faith to enlist Sunrise's cooperation in getting the plat application filed so that Sunrise would realize its contractual right to have the application filed before the null and void date.

Finally, the third element of equitable estoppel is not satisfied because by holding Trinity to the 60 day deadline for filing the plat application Sunrise would not be "contradict[ing] or repudiat[ing] the prior act."

The trial court erred in signing Trinity's proposed conclusions on equitable estoppel, which was never pled, argued or proven.

C. The trial court erred in finding that Sunrise breached the duty of good faith because the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract.

The trial court concluded that Sunrise breached the duty of good faith and cooperation by failing to work through Kamieniecki's misinformation that the property had to be segregated before a preliminary plat application would be accepted:

The duty of good faith and cooperation required the parties to work through this problem together within a reasonable time. The parties did not do so because Sunrise Development took the position that the agreement was terminated. Had Sunrise Development acted in good faith, the parties would have worked together to have the preliminary plat application filed and the application would likely have been accepted by Ms. Diamond, the supervisor of PALS.

CL 16, CP 433.¹¹ This was error because the duty of good faith does not require a party to agree to terms not already included in a

¹¹ Unlike waiver and estoppel, breach of the duty of good faith was actually pled by Trinity, CP 4, although Trinity never argued that theory or articulated it in the same manner as the trial court. Trinity's complaint alleged that Sunrise breached the duty of good faith when Harry Corliss "took steps to cause Sunrise Development to not carry out the task of obtaining legal segregation of the larger parcel and providing a legal description for the 20-acres Property." CP 4. Trinity abandoned this theory, presumably because there was absolutely no evidence to support it and the only evidence contradicted it. RP 139-40, 241.

written contract.

Our Supreme Court has made clear that the duty of good faith “does not extend to obligate a party to accept a material change in the terms of its contract”:

There is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. **Metropolitan Park Dist. v. Griffith**, 106 Wn.2d 425, 437, 723 P.2d 1093 (1986); **Lonsdale v. Chesterfield**, 99 Wn.2d 353, 357, 662 P.2d 385 (1983); **Miller v. Othello Packers, Inc.**, 67 Wn.2d 842, 844, 410 P.2d 33 (1966). However, the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract. **Betchard-Clayton, Inc. v. King**, 41 Wn. App. 887, 890, 707 P.2d 1361, *review denied*, 104 Wn.2d 1027 (1985). Nor does it “inject substantive terms into the parties’ contract”. Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement. **Barrett v. Weyerhaeuser Co. Severance Pay Plan**, 40 Wn. App. 630, 635 n.6, 700 P.2d 338 (1985). Thus, the duty arises only in connection with terms agreed to by the parties. See **Matson v. Emory**, 36 Wn. App. 681, 676 P.2d 1029 (1984); **Lonsdale v. Chesterfield**, 99 Wn.2d 353, 662 P.2d 385 (1983); **CHG Int’l, Inc. v. Robin Lee, Inc.**, 35 Wn. App. 512, 667 P.2d 1127, *review denied*, 100 Wn.2d 1029 (1983); **Miller v. Othello Packers, Inc.**, 67 Wn.2d 842, 843-44, 410 P.2d 33 (1966).

Badgett v. Security State Bank, 116 Wn.2d 563, 569-70, 807 P.2d 356 (1991). In **Badgett**, the plaintiffs claimed that defendant bank had breached its duty of good faith by failing to consider a proposal by the plaintiffs to negotiate changes to their loan agreement. No provision of the loan agreement required the bank

to consider the proposal, and the bank was under no obligation to modify the contract. Rather, the plaintiffs asserted that the bank was obligated by the duty of good faith to cooperate in their efforts to restructure their loan. 116 Wn.2d at 569. The Court rejected the Badgett's argument:

By urging this court to find that the Bank had a good faith duty to affirmatively cooperate in their efforts to restructure the loan agreement, in effect the Badgetts ask us to expand the existing duty of good faith to create obligations on the parties in addition to those contained in the contract -- a free-floating duty of good faith unattached to the underlying legal document. This we will not do. The duty to cooperate exists only in relation to performance of a specific contract term. See *Cavell v. Hughes*, 29 Wn. App. 536, 629 P.2d 927 (1981); *Long v. T-H Trucking Co.*, 4 Wn. App. 922, 926, 486 P.2d 300 (1971). As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms. *Allied Sheet Metal [Fabricators, Inc. v. People's Nat'l Bank]*, 10 Wn. App. [530] 535-36, [518 P.2d 734, rev. denied, 83 Wn.2d 1013, cert. denied, 419 U.S. 967 (1974)] accord, *Creeger Brick & Bldg. Supply Inc. v. Mid-State Bank & Trust Co.*, 385 Pa. Super. 30, 560 A.2d 151 (1989). The Badgetts received the full benefit of their contract when they received the amount of money they bargained for at the agreed rate of interest for the agreed period of time.

Id. at 570.

Our courts have not hesitated to follow the holding of *Badgett* that the duty of good faith does not inject new obligations into a contract, but only requires that parties perform their

obligations in good faith. *E.g.*, **Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.**, 86 Wn. App. 732, 741, 935 P.2d 628 (1997), *rev. denied*, 133 Wn.2d 1033 (1998); **Mayer v. Pierce County Med. Bureau**, 80 Wn. App. 416, 422, 909 P.2d 1323 (1995). The **Goodyear** court clarified that the duty of good faith is limited to contract clauses giving one party discretion:

The covenant of good faith applies when the contract gives one party discretionary authority to determine a contract term; it does not apply to *contradict* contract terms. **Amoco Oil Co. v. Ervin**, 908 P.2d 493, 498 (Colo. 1995). Ervin's statement of this distinction is apt:

The duty of good faith and fair dealing applies when one party has discretionary authority to determine certain terms of the contract, such as quantity, price, or time. . . . The covenant may be relied upon only when the manner of performance under a specific contract term *allows for discretion, on the part of either party* However, it will not contradict terms or conditions for which a party has bargained.

Ervin, 908 P.2d at 498 (emphasis added).

86 Wn. App. at 738-39 (emphasis in original).

Sunrise did not breach any duty of good faith under these principles. The PSA did not impose on Sunrise any obligation to extend the null and void date of ¶ 8 or to work with Trinity to try to overcome the “calamity” caused by Kamieniecki’s incorrect advice. Under **Badgett**, Sunrise had every right to “simply stand[] on its rights to require performance of a contract according to its terms.”

Badgett, 116 Wn.2d at 570. The PSA provided that it was “null and void” if Trinity failed to file the plat application by September 4 and Sunrise did not act in bad faith in enforcing that deadline.

Trinity could have asked Sunrise before the September 4 “null and void” date to assist Trinity in expediting the segregation request or in filing the plat application. Sunrise would have had a contractual obligation to cooperate both under PSA ¶ 7 and under the duty of good faith. But Trinity never asked for Sunrise’s help and did not even tell Sunrise before September 4 of Trinity’s belief that it could not file the plat application without the segregation.

It is even more clear under **Goodyear** that Sunrise did not breach any duty of good faith. As the **Goodyear** court held, the duty of good faith “applies when the contract gives one party discretionary authority to determine a contract term; it does not apply to *contradict* contract terms.” 86 Wn. App. at 738 (emphasis in original). Sunrise had no discretionary authority to set the “null and void” date of ¶ 8—the contract clearly established the date as September 4. Although the parties could certainly mutually agree to change the date, Sunrise had no discretion to do so and the duty of good faith has no application here.

The trial court erred by imposing an additional duty on Sunrise under the guise of the duty of good faith when the court imposed a duty on Sunrise to work with Trinity and extend the null and void date beyond September 4.

D. Trinity's duty to file the plat application was both a duty and a condition precedent, the failure of which excused Sunrise from any further performance under the PSA.

The trial court's decision was based on waiver, equitable estoppel, and the duty of good faith, none of which entitled Trinity to any relief for the reasons discussed above. Accordingly, Sunrise properly advised Trinity that in accordance with paragraph 8, the PSA was null and void and Sunrise would not perform.

This court reviews the construction of a contract provision de novo. *Tacoma Northpark, LLC v. NW, LLC*, 123 Wn. App. 73, 80, 96 P.3d 454 (2004). In *Tacoma Northpark* and other cases, this Court has distinguished carefully between conditions precedent and promises:

"Conditions precedent" are "those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available." *Ross v. Harding*, 64 Wn.2d 231, 236, 391 P.2d 526 (1964). In contrast, a breach of a contractual obligation subjects the promisor (NW) to liability for damages, but it does not necessarily discharge the other party's (O'Connor's) duty of

performance. But the nonoccurrence of a condition precedent prevents the promisor (NW) from acquiring a right (to require O'Connor to purchase the property) or deprives it of one, but it does not subject the promisor (NW) to liability. **Ross**, 64 Wn.2d at 236 (Whether a provision in a contract is a condition, the nonfulfillment of which excuses performance, depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances.); **Jones Assoc. [v. Eastside Props., Inc.]** 41 Wn. App. [462,] 466, 704 P.2d 681 [(1985)] (quoting 5 Samuel Williston, A Treatise on the Law of CONTRACTS, § 663, at 127 (Walter H.E. Jagged. 3rd ed.1961)).

Id. at 79.

The deadline in paragraph 8 for filing the preliminary plat application was both a promise and a condition precedent. Trinity agreed to file the application, which is clearly a promise. Ex. 1, ¶ 8. But ¶ 8 also clearly provides that the agreement is null and void if Trinity does not meet this deadline. *Id.* Filing the approval within 60 days was clearly a condition precedent.

The Findings of Fact incorporate several excuses for Trinity's failure to honor its promise to file the preliminary plat application within 60 business days. Findings 12 through 15 recite that Trinity would not have a correct legal description for the property until the segregation process was completed. These are actually conclusions of law which are incorrect. Only two things are required to legally convey real property -- a signed deed and a legal

description. RCW 64.04.010, .020; ***Berg v. Ting***, 125 Wn.2d 544, 562, 886 P.2d 564 (1995); ***Martin v. Seigel***, 35 Wn.2d 223, 229, 212 P.2d 107 (1949); ***Martinson v. Cruikshank***, 3 Wn.2d 565, 567, 101 P.2d 604 (1940). In any event, the relationship between segregation and a correct legal description is irrelevant to the null and void date.

The trial court held that it was “reasonable” for Trinity to rely on Kamieniecki’s statements that the plat would not be accepted for filing without segregation. FF 35, CP 428-29. The Court also found that, “Clark McGowan of Trinity Land reasonably believed that Sunrise Development would provide an extension of time to file the preliminary plat application.” FF 36, CP 429. The reasonableness or unreasonableness of Trinity’s beliefs and conclusions is irrelevant to the expiration of the null and void date as a condition precedent. If Trinity’s actions and conclusions were reasonable, Trinity might arguably have a defense against Sunrise for breaching its promise to file the preliminary plat application. But that would not change the failure of the condition precedent, which rendered the contract null and void.

Moreover, it was not reasonable for Trinity to accept Kamieniecki’s statement or to believe that Sunrise would extend the

filing deadline. The PSA obligated Sunrise to cooperate with Trinity in the plat application process. Ex. 1, ¶ 7. Reasonableness would require Trinity to ask for Sunrise's cooperation in satisfying the condition precedent of filing. If Trinity had simply told Sunrise about the problem with a segregated number, Halsan could have told Trinity to file the plat with the larger parcel number. RP 128. Substantial evidence was presented that the County would have accepted such an application. RP 432-33, 436-37, 597, 483-84. Moreover, Sunrise could have asked the County to expedite the segregation request. RP 463-64.

Finally, in ordering specific performance, the trial court found that if Trinity paid the remainder of the purchase price and closed on the property no later than May 18, 2006, Sunrise "will be receiving its payment sooner than the terms originally set forth in the purchase and sale agreement." CP 458. This is simply incorrect. Under the PSA, the sale was required to close no later than 12 months after removal of the feasibility contingency, which occurred on June 11, 2003. Ex. 1 ¶ 10.B. This is two years earlier than the closing date set by the court in the decree of specific performance.

E. Sunrise is entitled to recover its attorney fees and costs.

The PSA provides that the prevailing party in litigation shall recover attorney fees and costs:

If Purchaser or Seller commence a lawsuit to collect any earnest monies or to enforce or declare the meaning of any provision of this Agreement, then the prevailing party in addition to other relief, shall be entitled to recover its reasonable attorney's fees and other costs, including attorney's fees and costs on appeal.

Ex. 1 ¶ 15.E.(3). The Court should hold that Sunrise is the prevailing party, reverse the fees awarded to Trinity at the trial court level, award fees to Sunrise on appeal, and remand for an award of the fees incurred by Sunrise at the trial court level.

CONCLUSION

Neither waiver nor estoppel was pled or argued by Trinity, and neither is supported by the evidence or the law. Nor does the duty of good faith support the judgment. Sunrise respectfully asks

the Court to reverse the judgment and award of specific performance and to award attorney fees to Sunrise on appeal and at trial.

RESPECTFULLY SUBMITTED this 7 day of December 2006.

TOUSLEY BRAIN STEPHENS PLLC WIGGINS & MASTERS, P.L.L.C.



Michael D. Daudt, WSBA 25690
1700 Seventh Avenue, Ste 2200
Seattle, WA 98101
(206) 682-5600



Charles K. Wiggins, WSBA 6948
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing BRIEF OF APPELLANT postage prepaid, via U.S. mail on the 7 day of December, 2006 to the following counsel of record at the following addresses:

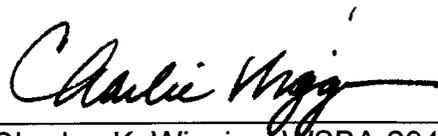
Co-Counsel for Appellant Sunrise Development Corporation:

TOUSLEY BRAIN STEPHENS PLLC
Michael D. Daudt
David D. Hoff
1700 Seventh Avenue, Suite 2200
Seattle, WA 98101

Counsel for Respondent Trinity Land Development Co.:

GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, P.L.L.C.
Salvador A. Mungia
1201 Pacific Avenue, Suite 2200
P.O. Box 1157
Tacoma, WA 98401-1157

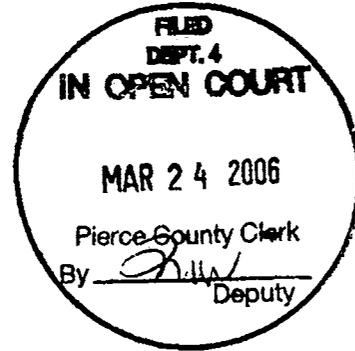
06 DEC 08 AM 11:00
STATIONER
COPIES
1157



Charles K. Wiggins, WSBA 6948



04-2-11427-1 25185585 FNFL 03-27-06



SUPERIOR COURT WASHINGTON COUNTY OF PIERCE

TRINITY LAND DEVELOPMENT, L.L.C., a
Washington limited liability company,

Plaintiff,

vs

SUNRISE DEVELOPMENT CORPORATION
OF WASHINGTON, a Washington corporation.

Defendant.

NO. 04-2-11427-1

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The Court, after hearing all the evidence at trial, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff Trinity Land Development, L.L.C is a limited liability company organized under the laws of the State of Washington ("Trinity Land") and has paid all fees due the State of Washington.
2. Defendant Sunrise Development Corporation of Washington is a corporation organized under the laws of the State of Washington ("Sunrise Development").

3. On April 29, 2003, the parties entered into a purchase and sale agreement where Sunrise Development agreed to sell, and Trinity Land agreed to purchase, certain undeveloped real subject property located in Pierce County, Washington ("the subject property"). The subject property is located within the Sunrise Master Plan Community, a legally significant real estate development designation. The Sunrise Master Plan Community is a real estate development project of Sunrise Development.
4. Clark McGowan of Trinity Land and Carl Halsan on behalf of Sunrise Development were the two individuals primarily involved in the negotiations of the purchase and sale agreement.
5. At the time the parties entered into the purchase and sale agreement both parties believed that the subject property was approximately more or less twenty acres in size. However, the intent of the parties was that the subject property would be at least twenty acres in size. The subject property was an undivided portion of a 288 acre parcel. Division of subject property twenty acres in size or greater allows the segregation of the parcels without having to complete a formal subdivision process. This is permitted pursuant to RCW 58.17 and Pierce County Code 16.02.
6. The purchase and sale agreement required Sunrise Development to provide a correct legal description for the subject property no later than completion of the period of feasibility. The period of feasibility could be concluded or waived by Trinity Land at any time prior to 30 days after the execution of the purchased and sale agreement. The maximum period of time in which to do this was, therefore, June 11, 2003.

7. Sunrise Development did not provide a correct legal description to Trinity Land by June 11, 2003.
8. Both parties contemplated, at the time of entering into the purchase and sale agreement, that Trinity Land would be able to file a preliminary plat application within ninety ^{business} days of the execution of the agreement. The purchase and sale agreement provided that Trinity Land would have thirty business days from the date of contract execution as a feasibility period to consider whether the land would be able to be developed and opt out or continue on with the purchase of the realty. During that time period, Trinity Land gave timely notice to that the subject property was feasible to develop to Sunrise Development. Thereafter, the purchase and sale agreement provided that Trinity Land had sixty business days (*i.e.* to September 4, 2003) in which to file a preliminary plat application with Pierce County.
9. The purchase and sale agreement contained a clause stating that "time is of the essence of this Agreement."
10. The parties did not intend that the purchase and sale agreement would include all the terms of their agreement regarding the subject property.
11. The parties agreed that Sunrise Development would have the duty of having the subject property segregated from its larger parent parcel of 288 acres. In the segregation process, the divided subject property is assigned a unique real estate tax parcel number by the county.

12. In Pierce County, to obtain a twenty-acre segregation under PC Code 16.02, a subject property owner must provide a metes and bounds legal description to the Pierce County Auditors-Assessors Office.
13. If the submission for segregation of a subject property under PC Code 16.02 is not at least twenty acres, then the request will be denied.
14. The parties had no assurance that the subject property was at least twenty acres and could therefore be segregated under Pierce County Code 16.02 until the segregation process was completed by Pierce County.
15. Until the segregation process was completed so that the boundaries were set to achieve at least a twenty-acre parcel of subject property, Trinity Land would not have a correct legal description for the subject property.
16. Normally, once a segregation request had been submitted in Pierce County, it would take approximately sixty days to have the request processed. However, because of computer programming and other issues, the segregation request was not completed by the county until February of 2004.
17. Sunrise Development retained Randy Haydon of Sitts & Hill Engineering to prepare and submit the request to have the subject property segregated from the larger 288 acre parcel.
18. Sunrise Development first contacted Haydon on approximately June 23, 2003 to perform the work necessary to submit a request to have the parcel segregated from the larger parent parcel.
19. Nothing prevented Sunrise Development from engaging Mr. Haydon at an earlier time to start the segregation process.

20. Harry Corliss, a principal of Sunrise Development, signed the segregation application on July 7, 2003.
21. Sunrise Development submitted the segregation application sometime after July 7, 2003 to the Pierce County Assessor's Office.
22. Trinity Land retained Rich Larson of Larson and Associates to prepare the materials needed to submit the application for preliminary plat approval.
23. Larson and Associates had all the materials needed to submit the preliminary plat application prior to the end of August, 2003.
24. It was Rich Larson's opinion, and understanding at that time, that Pierce County would not accept a preliminary plat application until the subject property had been segregated and had been assigned its own parcel number.
25. Rich Larson was an experienced engineer who had been submitting preliminary plat applications on behalf of his clients for twenty-five years. He was familiar with the preliminary plat application process in Pierce County.
26. From the time that the purchase and sale agreement had been executed, Clark McGowan of Trinity Land had been making inquiries with various representatives of Sunrise Development, including Carl Halsan, Fred Anderson and Randy Haydon, regarding the status of the segregation request. McGowan was told that the request had been submitted and not to worry about it.
27. In August 2003, Rich Larson told Clark McGowan that everything was ready in order to submit the preliminary plat application. However, Larson told McGowan that Pierce County would not accept the preliminary plat application unless the

segregation had been completed and the subject property had its own parcel number.

28. McGowan told Larson to submit the application because the purchase and sale agreement required that Trinity Land submit the preliminary plat application no later than September 4, 2003.
29. Larson directed one of his employees, Bill Diamond, to check with Steve Kamieniecki of Pierce County Planning and Land Services ("PALS") to determine whether or not Larson could submit the preliminary plat application without the subject property being segregated from the larger 288 acre parcel.
30. Kamieniecki was a planner, level II, with PALS. He had held that position since 1997. He was the planner responsible for processing applications within the Sunrise Master Plan Community since 1997. The subject property is located with the Sunrise Master Plan Community.
31. Diamond met Kamieniecki at the PALS office on August 20, 2003. Kamieniecki was familiar with the subject property, the larger parent parcel, and the entire Sunrise Master Plan Development. Diamond and Kamieniecki located the subject property on a map of the Sunrise Master Plan Development. Diamond asked Kamieniecki whether Larson could submit a preliminary plat application on the subject property even though the subject property was not segregated. Kamieniecki told Diamond that they could not submit the preliminary plat application until the subject property had been segregated.
32. Kamieniecki would have been the planner who would have handled this proposed application. He had the authority to reject the application as being incomplete. In

2003 Mr. Kamieniecki's understanding of Pierce County's regulations regarding preliminary plat applications was that an applicant could not submit such an application on a portion of land within a larger parcel such as the case here when Mr. Diamond spoke to him in August of 2003. There were policy reasons for this restriction and also logistical reasons as well. For example, without a parcel number for the subject property it is difficult for Pierce County to identify for interested parties and governmental agencies what specific property was the object of the preliminary plat application.

33. In 2003, Mr. Kamieniecki would have rejected the preliminary plat application if Larson had attempted to file it on behalf of Trinity Land because the subject property was not yet segregated from the parent parcel.
34. Master planned communities are an infrequent form of real estate development. In some circumstances they are subject to different rules than other forms of real estate development. Pierce County had an unwritten exception to its requirement for property segregation to be complete prior to acceptance of a preliminary plat application that applied only to master planned communities. Vicky Diamond, the supervisor of the Planning and Land Services Department for Pierce County, knew about this exception and would have granted the exception if it had been brought to her attention. Trinity Land would not learn of this exception to the rule until after Sunrise Development made clear that it would not proceed to sell the subject property in accordance with the purchase and sale agreement.
35. It was reasonable for Trinity Land and its representatives to rely upon Mr. Kamieniecki's statements that the preliminary plat application for the subject

property would not be accepted for filing by Pierce County without the subject property being segregated and having its own parcel number. It was therefore reasonable for Mr. Larson, on behalf of Trinity Land, to determine that Trinity Land should not attempt to file the application as it would be rejected.

36. Clark McGowan of Trinity Land reasonably believed that Sunrise Development would provide an extension of time to file the preliminary plat application.
37. On September 5, 2003, Scott Corliss, an adult son of Harry Corliss, directed Sunrise Development's attorney to draft a letter for Harry Corliss' signature informing Trinity Land that Sunrise Development considered the purchase and sale agreement null and void because Trinity Land had not submitted the preliminary plat application by the time required by the purchase and sale agreement. Such a letter was so drafted, signed by Harry Corliss and delivered to Trinity Land.
38. From the execution of the purchase and sale agreement, Scott Corliss was unhappy with the agreement and, shortly after the agreement was executed, was seeking ways to get out of the deal. Scott Corliss, though not formally an officer of Sunrise Development, had an ownership interest in Sunrise Development and had authority to execute decisions on behalf of Sunrise Development.
39. Representatives of Trinity Land and Sunrise Development met on September 10, 2003 to discuss their dispute.
40. By a letter dated September 15, 2003, Sunrise Development once again stated that it was its position that the contract was terminated.
41. Through September 2003, both parties believed that Trinity Land could not submit the preliminary plat application to Pierce County without the subject property first

being segregated from the larger parcel. At trial, Sunrise Development produced evidence that the parcel number for a larger parcel of land – in Sunrise Development’s Sunrise Master Planned Community – had been used in 1999 to submit a plat application for a subdivision known as Deer Ridge. This had been done prior to the smaller parcel’s having been segregated and receiving its own real estate tax parcel number. In the case of Deer Ridge, the purchaser of the smaller parcel was not Trinity Land. But this information was either forgotten or it was never known or realized by Sunrise Development’s representatives at the time discussions were taking place with Trinity Land during the Fall of 2003 in the aftermath of Sunrise Development declaring the purchase and sale agreement at an end. The preliminary plat application for Deer Ridge had not been prepared by Sunrise Development. If Sunrise Development did know of Pierce County’s special exception from the segregation rule for master planned communities, it did not in good faith timely communicate this information to Trinity Land.

42. The parties had some subsequent discussions regarding their dispute. However, Sunrise Development maintained its position that the agreement was null and void.
43. Trinity Land paid \$50,000 in earnest money to Sunrise Development. In addition, Sunrise Development incurred costs in preparing the preliminary plat application.
44. ~~The subject property is unique real estate property.~~

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and over the subject matter of this dispute.
2. Venue was proper as the subject property is located in Pierce County.
3. Forfeitures are not favored under Washington law and are never enforced in equity unless the right is so clear as to permit no denial.
4. Where time is made of the essence in a contract, its strict enforcement can be waived by the parties' actions.
5. In every contract there is a duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefits of performance of the contract.
6. Evasion of the spirit of the bargain may constitute a breach of the duty of good faith and fair dealing.
7. A breaching party may not demand performance from a non-breaching party.
8. The following are the elements of equitable estoppel: (1) an admission, statement, or act inconsistent with a claim afterward asserted; (2) action taken in reliance on that admission, statement, or act; and (3) injury to the relying party by allowing the other party to repudiate or contradict the prior act.
9. Sunrise Development led Trinity Land to believe that time was not of the essence when Sunrise Development did not comply with the time is of the essence provision of the purchase and sale agreement. This occurred when Sunrise Development failed to timely provide Trinity Land with a correct legal description of the subject property. This should have been accomplished no later than June 11, 2003. Trinity

Land relied upon Sunrise Development's actions that demonstrated that Sunrise Development did not regard that time was of the essence. Allowing Sunrise Development to repudiate or contradict its prior act by subsequently strictly enforcing the September 4, 2003 deadline would injure Trinity Land.

10. Waiver is the intentional act of relinquishing a known right.
11. Sunrise Development waived strict insistence regarding the essence of time in the agreement by failing to comply with the June 11, 2003 deadline for providing a correct legal description. Trinity Land waived strict insistence regarding essence of time in the agreement by allowing Sunrise Development to comply with this requirement.
12. An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.
13. The April 29, 2003 Purchase and Sale Agreement was not an integrated agreement as to the parties' rights and obligations regarding the segregation of the subject property from the larger parent parcel was separately agreed.
14. Sunrise Development was contractually obligated to obtain the segregation of the parcel at issue from the larger parent parcel. Sunrise Development agreed that it would be its responsibility to obtain the segregation and the tax parcel ID that accompanies the segregation and in fact took action with deliberate speed to do so. Sunrise Development was initially obligated to obtain the segregation by June 11, 2003.
15. Trinity Land was not obligated to actually attempt to submit the preliminary plat application without the subject property being segregated and having a separate

parcel number. Mr. Kamieniecki told Larson & Associates that it could not be submitted without a separate parcel number and Trinity Land was entitled to rely upon the representations of the PALS employee who was in charge of the Sunrise Development. Moreover, time was no longer of the essence for Trinity Land to submit the preliminary plat application on or before September 4, 2003.

16. More likely than not, Mr. Kamieniecki was incorrect about his conclusion that the subject property needed to be segregated before Trinity Land could submit its preliminary plat application. Both parties believed, in 2003, that segregation was necessary before a preliminary plat application would be accepted by Pierce County. The duty of good faith and cooperation required the parties to work through this problem together within a reasonable time. The parties did not do so because Sunrise Development took the position that the agreement was terminated. Had Sunrise Development acted in good faith, the parties would have worked together to have the preliminary plat application filed and the application would likely have been accepted by Ms. Diamond, the supervisor of PALS. Instead, Sunrise Development terminated the agreement on September 5 and never changed its position.

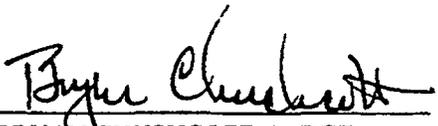
17. ~~The subject property is unique and an award of damages would not adequately compensate Trinity Land. Accordingly, Trinity Land is entitled to specific performance.~~ *BEC* The Court will hold a subsequent trial phase to resolve any issues pertaining to how to now carry out the agreement.

18. The purchase and sale agreement provided that the prevailing party in any dispute is entitled to recover their attorney fees and costs. ~~Trinity Land is the prevailing party.~~ *BEC*

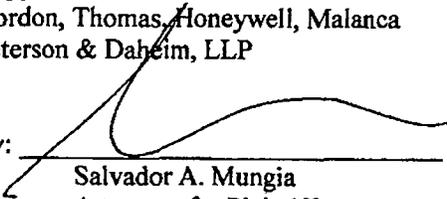
~~After the Court's determination as to the conditions of specific performance, Trinity~~

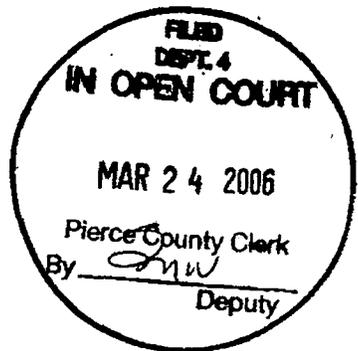
~~and is to submit, by motion, a request for its reasonable attorney fees and costs~~ **DEC**

DONE IN OPEN COURT this 24th day of March, 2006.


BRYAN CHUSHCOFF, JUDGE

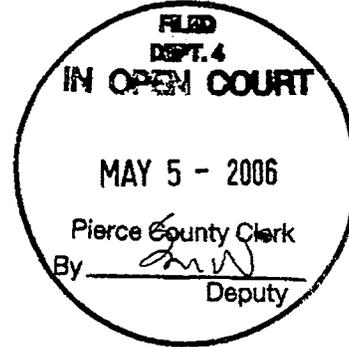
Copy received:
Gordon, Thomas, Honeywell, Malanca
Peterson & Dahm, LLP

By: 
Salvador A. Mungia
Attorneys for Plaintiff



Copy received:
Tousley Brain Stephens, PLLC

By: 
Michael Duane Daudt
Attorneys for Defendant



SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

TRINITY LAND DEVELOPMENT, L.L.C., a
Washington limited liability company,

Plaintiff,

vs

SUNRISE DEVELOPMENT CORPORATION
OF WASHINGTON, a Washington corporation.

Defendant.

NO. 04-2-11427-1

FINDINGS AND CONCLUSIONS OF
LAW

Assigned Judge: Bryan Chushcoff

On April 18, 2006, this Court was prepared to conduct the second phase of the trial that began on October 31, 2005. The second phase was to determine the appropriate remedy to be awarded to the Plaintiff: specific performance or an award of damages. At that time, the Defendant, in open court, stated that its sole objection to an award of specific performance was that, in its view, Pierce County had changed its regulations from what existed when this dispute arose. According to the Defendant, it would now have to convey the deed to the subject property in order for the Plaintiff to file its preliminary plat application. According to the Defendant, this would be inequitable because the Plaintiff would not be obligated, under the terms of the purchase and sale agreement, to pay the remainder of the purchase price until the earlier of the approval of the preliminary plat application or nine months (with a possible

FIND. & CONC. - 1 of 4
(04-2-11427-1)
[1347060 v6.doc]

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 820-8500 - FACSIMILE (253) 820-8565

1 three month's worth of extensions if the Plaintiff paid additional fees). The Defendant
 2 admitted that the property at issue is unique.

3 The Plaintiff, while not conceding that Pierce County had changed its regulations as
 4 had been asserted by the Defendant, represented, in open court, stated that it was willing to
 5 negate the Defendant's concern by simply paying the full remaining purchase price within
 6 thirty days. Based upon these admissions and representations made in open court, the Court
 7 determined that a second phase of the trial was unnecessary.
 8

9 The Court makes the following Findings of Fact and Conclusions of Law.

10 **I.**
 11 **FINDINGS OF FACT**

- 12 1. The property at issue in this dispute is unique.
- 13 2. If Plaintiff pays the remainder of the purchase price, and closes on the property, no
 14 later than May 18, 2006, the Defendant will be receiving its payment sooner than the terms
 15 originally set forth in the purchase and sale agreement. Plaintiff's willingness to pay \$2.4
 16 million by May 18, 2006 is appropriate to carry out the terms of the contract and place the
 17 parties in the position they would have been in had the transaction closed pursuant to the
 18 original contract.

19 **II.**
 20 **CONCLUSIONS OF LAW**

- 21 1. The decree of specific performance should place the parties, as far as possible, in
 22 the condition in which they would have been if the contract had been duly performed at the
 23 time the contract were to be carried out.
- 24 2. Once a court determines that specific performance in the appropriate remedy, it is
 25 left to the discretion of the court to enforce the remedy.
 26

FIND. & CONC. - 2 of 4
 (04-2-11427-1)
 [1347060 v6.doc]

LAW OFFICES
 GORDON, THOMAS, HONEYWELL, MALANCA,
 PETERSON & DAHEIM LLP
 1201 PACIFIC AVENUE, SUITE 2100
 POST OFFICE BOX 1157
 TACOMA, WASHINGTON 98401-1157
 (253) 620-6500 - FACSIMILE (253) 620-6565

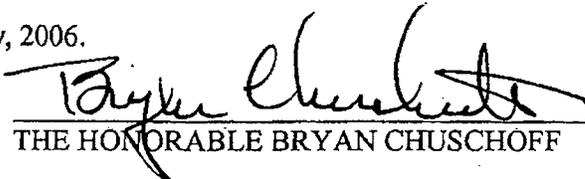
1 3. The general rule is that a vendor or purchaser may obtain specific performance of a
2 contract for the sale of realty.

3 4. The trial court, in granting specific performance, confirms the contract and
4 accommodates the breach.

5 5. As a general rule, a decree of specific performance should place the parties in the
6 position to which they would have been had the transaction closed pursuant to the original
7 agreement.

8 6. Plaintiff is the prevailing party in this litigation. The purchase and sale agreement
9 provided that the prevailing party is entitled to an award of attorney fees and costs. The Court
10 directs the Plaintiff to request an award of attorney fees and costs by subsequent motion. This
11 motion can be made after entry of the initial judgment and a subsequent, amended judgment,
12 will be entered to reflect the award of attorney fees and cost.
13

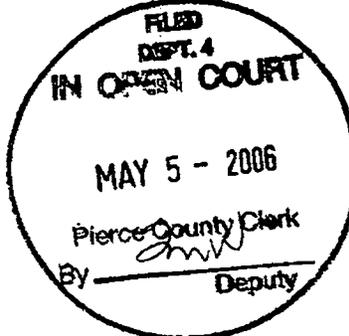
14 Dated this 5th day of May, 2006.


THE HONORABLE BRYAN CHUSCHOFF

15 Presented By:

16 GORDON THOMAS, HONEYWELL,
17 MALANCA, PETERSON & DAHEIM, LLP

18 By 
19 Salvador A. Mungia, WSBA No. 14807
20 smungia@gth-law.com
21 Attorneys for Plaintiffs

22 

23 FIND. & CONC. - 3 of 4
24 (04-2-11427-1)
25 [1347060 v6.doc]

26 LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 - FACSIMILE (253) 620-6565

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Approved as to Form

TOUSLEY BRAIN STEPHENS

By: _____
Michael D. Daudt, WSBA No. 25690
Attorneys for Defendant

FIND. & CONC. - 4 of 4
(04-2-11427-1)
[1347060 v6.doc]

LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 820-8500 - FACSIMILE (253) 820-8585

REAL ESTATE PURCHASE AND SALE AGREEMENT

Trinity Land Development L.L.C. and/or assigns (hereinafter referred to as "Purchaser"), hereby agree to purchase; and Sunrise Development Corporation of Washington, in undivided interests (hereinafter referred to as "Seller's"), hereby agrees to sell, all in accordance with the following terms, provisions, and conditions, certain undeveloped real property located in Pierce County, Washington, and consisting of approximately 20 acres. Said real property is hereinafter referred to as "Real Property" and is legally described on Exhibit "A".

1. PURCHASE PRICE. The purchase price for the Real Property is Two Million Four Hundred Thousand and no/100th Dollars (\$2,400,000.00).
2. EARNEST MONEY. Purchaser hereby deposits with Seller a One Hundred Thousand and No/100th Dollars (\$100,000.00) Promissory Note (The "Earnest Money Note") as earnest money, which Earnest Money Note shall be converted to cash and paid to Seller by Purchaser in accordance with its terms as provided in Paragraph 6 and 8 below.
3. PAYMENT OF PURCHASE PRICE. The purchase price shall be paid as follows: Purchaser agrees to pay (ALL CASH) at closing to include Sellers received earnest money, according to the Terms and Conditions of this Agreement.
4. CONVEYANCE AND CONDITION OF TITLE. The title to the Real Property shall be conveyed by Seller to Purchaser at Closing by Statutory Warranty Deed, free and clear of all liens, encumbrances or defects except those approved by Purchaser as provided in Paragraph 5 below.
5. TITLE INSURANCE. At closing, Seller shall cause Chicago Title Insurance Company to issue a standard form owner's policy of title insurance to Purchaser in an amount equal to the total purchase price of Real Property.
In this regard, and as soon as reasonably possible following the date of mutual acceptance of this Agreement, Seller shall cause Chicago Title Insurance Company to issue to Purchaser a preliminary commitment for such title insurance policy together with full copies of any exceptions set forth therein (hereinafter "Preliminary Commitment"). Purchaser shall have twenty (20) business days after delivery of said Preliminary Commitment within which to notify Seller, in writing, of Purchaser's disapproval of any exceptions shown on the Preliminary Commitment.
In the event of disapproval by Purchaser of any exceptions or defects as set forth in the Preliminary Commitment, Seller shall have thirty (30) business days from delivery of Purchaser's notice to eliminate any disapproved exceptions

1

Initials 

SDC 0001

APPENDIX C

from the policy of title insurance to be issued in favor of Purchaser; provided that monetary encumbrances and liens, if any, shall be paid by Seller at Closing.

If disapproved exceptions are not eliminated within said thirty (30) business day period, or if Seller notifies Purchaser in writing that Seller will not eliminate the same, then this Agreement shall be terminated; and neither Purchaser nor Seller shall have any further rights, duties, or obligations hereunder except that the Earnest Money Note previously delivered by Purchaser shall be immediately returned to Purchaser; unless within (5) business days of the earlier of (i) the expiration of said thirty (30) business day periods, or (ii) the date that Seller notifies Purchaser that Seller will not eliminate the disapproved exceptions. Purchaser waives its prior disapproval and elects to proceed with Closing subject to the disapproved exceptions(s).

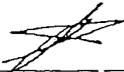
6. FEASIBILITY CONTINGENCY. Purchaser's obligations under this Agreement are contingent and conditioned upon Purchaser's feasibility study. In this regard, Purchaser shall have until thirty (30) business days from the date of mutual acceptance of this Agreement (the "feasibility period") to determine, in Purchaser's sole and absolute discretion, if the Real Property is feasible for development by Purchaser.

If Purchaser fails to notify Seller of its approval of the Real Property, in writing, on or before the expiration of the feasibility period, then this Agreement shall terminate, and neither Purchaser nor Seller shall have any further rights, duties or obligations hereunder, except that the Earnest Money Note previously delivered by Purchaser shall be immediately returned to Purchaser. Further, Purchaser agrees to indemnify and save Seller harmless from any cancellations charges for Title Insurance, and will return the Real Property to its original state (i.e. fill all boring holes, etc.).

In the event Purchaser notifies Seller in writing of its approval of the Real Property within the feasibility period, then concurrently with the delivery of such notice, Purchaser shall pay Fifty Thousand and no/100th Dollars (\$50,000.00) of the Earnest Money Note directly to Seller, as a non-refundable Earnest Money which shall be credited against the purchase price at Closing, the balance of the Earnest Money shall be paid upon removal of contingency for plat approval.

Purchaser's feasibility study may include (but is not limited to) soils, utilities availability and sewer capacity, access availability, zoning, preliminary architectural and engineering studies, marketing feasibility, costs of "offsite" improvements, and financing costs and availability. In connection with its feasibility study, Purchaser shall have the right to enter onto the Real Property.

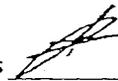
Seller agrees to deliver to Purchaser on or before five (5) business days from the date of mutual acceptance of this Agreement, copies of: (i) all engineering and related studies made on behalf of Seller, if any, in connection with the development of the Real Property; (ii) all architectural marketing studies, and appraisals made on behalf of Seller and relating to the Real Property, and (iii) all engineering, studies and governmental approvals relating to the existing water wells on the Real Property.

 _____

Purchaser agrees to indemnify and hold harmless the Seller from any and all costs or expenses incurred by or on behalf of Purchaser in undertaking such feasibility study; and if Purchaser does not remove the feasibility contingency on or before the expiration date of the feasibility period, then Purchaser also agrees to immediately deliver to Seller all information and documentation obtained by Purchaser in connection with its feasibility study.

7. COOPERATION TO SUBDIVIDE PROPERTY. Seller hereby understands and agrees that Purchaser may plat, subdivide, rezone and develop any or all portions of the Real Property contained in this contract provided Purchaser does so at their sole expense. Seller further agrees to join with Purchaser in signing the dedication of any Preliminary Plat and or PDD that Purchaser may elect to submit and will also join the Purchaser in any action as may be necessary to effect said Preliminary Plat and or PDD such as the signing of all application documents, easements, dedication of roads, acquisition of utilities, request for zoning, etc., at no expense to Seller and Purchaser agrees to indemnify and hold harmless the Seller from any liens that may be asserted against the Real Property because of any action or work done by the Purchaser, Purchasers Agent, or Representative.

8. CONTINGENCY PLAT APPROVAL. This offer is expressly contingent upon Purchaser obtaining approval from Pierce County for a Preliminary Plat and or PDD with conditions that are acceptable to the Purchaser, at his sole and absolute discretion. Purchaser agrees to make application for said Preliminary Plat and or PDD within sixty (60) business days of the date of the removal of the feasibility contingency noted in Paragraph 6 of this agreement. In the event Purchaser does not meet this deadline, then this agreement shall be null and void, unless otherwise extended by mutual agreement of both Seller and Purchaser, AND all earnest money deposited under this agreement shall be returned to the Purchaser except for Fifty Thousand and no/100th Dollars (\$50,000.00) non-refundable paid to Seller upon removal of feasibility contingency as per Paragraph 6. The closing of this transaction shall be expressly contingent upon the approval of said Preliminary Plat and or PDD application by Pierce County AND upon review and approval of the terms and conditions of said approval by the Purchaser to determine if these terms and conditions are acceptable to Purchaser in his sole and absolute discretion. Purchaser shall notify Seller within fourteen (14) business days after approval and governmental appeal period of Preliminary Plat and or PDD by Pierce County as set forth herein. If Purchaser fails to notify Seller of the acceptance of these terms and conditions, then this agreement shall be considered null and void unless otherwise agreed between Purchaser and Seller, and all refundable earnest monies deposited under this agreement shall be returned to Purchaser. If Purchaser elects to remove this contingency, then the balance due on the earnest money note shall be converted to cash, to apply to the purchase price at the time of closing.



D. Notices. All notices required or permitted to be given hereunder shall be in writing and shall be sent by U.S. certified mail, return receipt requested, or personal service, or by facsimile transmission addressed as set forth below.

(1) All notices to be given to Seller shall be addressed as follows:

Sunrise Development Corporation of Washington
c/o Harry Corliss
15807 134th Avenue
Puyallup, WA 98374
Phone: (253) 924-0102

Carl Halsan
P.O Box 1447
Gig Harbor, WA 98325
Phone: (253) 858-8820

2) All notices to be given to Purchaser shall be addressed as follows:

Clark R. McGowan
c/o Trinity Land Development L.L.C.
315 39th Ave. SW #6
Puyallup, WA 98373
Phone: (253) 845-2922

Either party hereto may, by written notice to the other, designate such other address for the giving of notices as may be necessary. All notices shall be deemed given on the day such notice is personally served, or on the date of the facsimile, or on the third day following the day such notice is mailed in accordance with this paragraph.

E. Defaults.

1) IF PURCHASER DEFAULTS HEREUNDER, SELLER'S SOLE REMEDY SHALL BE LIMITED TO DAMAGES AGAINST PURCHASER IN THE LIQUIDATED AMOUNT OF THE EARNEST MONEY AND EXTENSION PAYMENTS PREVIOUSLY PAID OR DUE TO SELLER. PURCHASER AND SELLER INTEND THAT SAID AMOUNT CONSTITUTES LIQUIDATED DAMAGES ON ACCOUNT OF THE DIFFICULTY IN MEASURING ACTUAL DAMAGES AND THE PARTIES BELIEVE SAID AMOUNT TO BE A FAIR ESTIMATE OF ACTUAL DAMAGES AND THE SELLER SHALL HAVE NO OTHER OR FURTHER CLAIM AGAINST THE PURCHASER IN THE EVENT OF THE PURCHASER'S DEFAULT.



2) **Default of Seller.** In the event the Seller shall be in default as to any terms and provisions of this agreement, or in the event any of the Seller's warranties or representations shall be untrue or inaccurate in any material respect, then in the event of default by Seller, the purchaser may, at purchaser's option do any of the following:

- a) Terminate the agreement by written notice delivered to Seller at or prior to closing, whereupon the earnest money shall immediately be returned to purchaser, or
- b) Request specific performance of the agreement against Seller, or
- c) Have such other remedies and rights as is available to the purchaser at law or in equity.

3) If it is necessary for either purchaser or Seller to employ an attorney to enforce the rights pursuant to this agreement because of default by the other, the defaulting party shall reimburse the non-defaulting party for, reasonable attorney's fees, together with all costs of litigation.

If Purchaser or Seller commence a lawsuit to collect any earnest monies or to enforce or declare the meaning of any provision of this Agreement, then the prevailing party in addition to other relief, shall be entitled to recover its reasonable attorney's fees and other costs, including attorney's fees and costs on appeal.

F. **Authority to Execute this Agreement.** If the Purchaser or Seller is a corporation, partnership, trust, estate, or other entity, the person executing this Agreement on its behalf warrants his or her authority to do so, and to bind Purchaser and/or Seller and any other entities having authority or responsibility for Purchaser and/or Seller.

G. **Binding Effect.** This Agreement shall be binding upon the parties hereto and their respective heirs, successors and assigns.

H. **Date of Mutual Acceptance.** For purposes of this Agreement, the date of mutual acceptance of this Agreement shall be the last date on which the parties to this Agreement have executed this Agreement as indicated below.

I. **Assignment.** Purchaser shall not assign its rights under this Agreement without the prior written consent of Seller, which consent will not be unreasonable withheld or delayed; provided, however, that such assignment shall not be deemed to constitute a novation and Purchaser shall continue to be responsible for its obligations under this Agreement.

J. **Facsimile Agreement.** Purchaser and Seller agree that a facsimile transmission of any original documents shall have the same effect as

 _____

an original. Any signature required on an original shall be completed when a facsimile copy has been signed.

The parties agree that the signed facsimile copies of documents shall be appended to the original thereof, integrated therewith, and given full effect as if an original.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date set forth below.

PURCHASER:
Trinity Land Development LLC



By: Clark R. McGowan,
Managing Member

Date: 4/29/03

SELLER:
Sunrise Development
Corporation of Washington



By: Harry Cortiss

Date: 4/24/03

Date: _____

Initials 

Exhibit "A"
Legal Description

Correct Legal Description for 20 acre parcel to be provided by the seller herein prior to removal of feasibility study as per item 6 herein.

EARNEST MONEY PROMISSORY NOTE

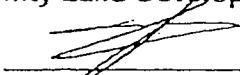
Date: April 29, 2003
Puyallup, WA 98373

FOR VALUE RECEIVED, I promise to pay to the order of the seller herein the principal sum of One Hundred Thousand and No Dollars (\$100,000.00), without interest, and delivered as Earnest Money and payable pursuant to Paragraph 2, and terms and conditions of the Real Estate Purchase and Sale Agreement, dated April 29, 2003.

In case suit is instituted to collect this note or any portion thereof, I promise to pay such additional sums as the court may adjudge reasonable as Attorney's fees in such suit.

This contract is to be construed in all respects and enforced according to the laws of the State of Washington.

Trinity Land Development L.L.C.



Clark R. McGowan