

No. 34842-0-II

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

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

Respondent

v.

SUNRISE DEVELOPMENT CORPORATION OF  
WASHINGTON, a Washington corporation,

Appellant.

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BRIEF

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RESPONDENT BRIEF

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The parties intended that the seller, Sunrise, sell a parcel at least twenty-acres in size to the buyer, Trinity that was yet to be segregated from a larger 288-acre parcel owned by Sunrise. The trial court found that the contract required Sunrise to provide a correct legal description for the 20+ acre property within thirty days of the execution of the agreement. The trial court found that in order to provide a correct legal description, Sunrise would have to have the twenty-acre parcel segregated from its larger parent parcel. Sunrise failed to do so.

By its failure to have the property legally segregated so that a correct legal description could be provided within thirty days of the execution of the agreement, Sunrise demonstrated that indeed time was not of the essence as it failed to abide by the first time requirement. Sunrise and Trinity both continued on with the terms of the agreement despite Sunrise failing to abide by the first contractual deadline.

The trial court, after hearing the evidence, ruled in favor of Trinity. That ruling should be upheld.

### **I. FACTUAL BACKGROUND**

During trial, Sunrise' counsel stated in open court:

I think that the Court has to find that, ultimately, for Trinity to prevail, I think that the Court would have to find that the parties mutually intended as a material term of the contract that this segregation be done, and that it was required.

(R.P. 540.) In fact, the trial court made those exact findings.

- FF 11: The parties agreed that Sunrise Development would have the duty of having the subject property segregated from its larger parcel of 288 acres. ...
- FF 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.

While Sunrise has challenged those findings of fact in this appeal, all it is doing is rearguing factual disputes. However, the standard on appeal is not for this Court to try to resolve factual disputes but instead is for this Court to examine the record to determine whether there is substantial evidence, to support the trial court's findings of fact. *Sac Downtown Ltd. Partnership v. Kahn*, 123 Wn.2d 197, 202, 867 P.2d 605 (1994). Here, there is substantial evidence to support all of the trial court's findings of fact.

A key element of this purchase and sale of real property agreement between the parties was that the parcel had to be at least twenty acres in size so that it could be divided from its larger parent parcel without the need of going through a short plat process. The only way to ensure that it was at least twenty acres was to have the property go through the

segregation process available under the Pierce County Code. All this was to be done before June 11, 2004. Sunrise failed to perform its obligations within the contractual time deadlines and yet took the position that Trinity was strictly bound by the contractual time deadlines. The trial court properly found in favor of Trinity in its claim to enforce the purchase and sale agreement and allow Trinity to exercise its right to specific performance.

Based upon the record, the trial court's decision should be upheld.

**A. Sunrise was contractually obligated to obtain a segregation of the twenty-acre parcel from the larger parent parcel.**

Sunrise was willing to sell, and Trinity willing to buy, a yet-to-be-segregated parcel of property contained within the Sunrise Master Planned Development – a development that is 288 acres. (FF 5.) At the time of the negotiations, neither party knew whether the parcel would be at least twenty acres in size. As Carl Halsan testified:

Q: Certainly, there was no certainty at that point that it was, in fact, 20 acres?

A: No certainty.

R.P. 65.

Both parties agreed that the parcel had to be at least twenty acres in size so that the property could be divided from the larger parent parcel without having to undergo the formal subdivision process. Instead, it could be segregated from the 288 acre parcel, and become a stand alone

parcel, by means allowed under RCW 58.17 and Pierce County Code 16.02.

Sunrise, in this appeal, is challenging the trial court's Finding of Fact 11 that the parties agreed that Sunrise had the duty to segregate the twenty-acre parcel from the parent parcel. Sunrise goes so far as to allege that "Sunrise gave no thought to the issue of segregation when the PSA was negotiated." (Sunrise brief, p. 10.) Sunrise' allegation goes against the weight of the evidence.

Ryan McGowan testified that Carl Halsan, who negotiated the deal between the parties, stated, during negotiations, that it was Sunrise' obligation to segregate the parcel. (R.P. 38.) Ryan McGowan testified:

Q: So even though you regarded "legal description" and "legal segregation" as synonymous, he used the word "segregation?"

A: Yes. Absolutely. That is solidified by the fact that they initiated the process very soon after us stating it again in the letter on removal of feasibility. They initiated the process, not us.

R.P. 49.

Carl Halsan testified that it was Sunrise' duty to segregate and that he conveyed that information to the Corlisses. Indeed, Mr. Halsan later recorded his recollections as to what occurred during negotiations and this documents was admitted into evidence at trial as Exhibit 61. In Exhibit

61, Mr. Halsan documented that during negotiation he told the Corlisses that it was Sunrise' obligation to segregate the parcel from the larger parent parcel:

Q: Now, looking at the April 10<sup>th</sup> entry [of exhibit 61], "deal changed to 20 acres that we would segregate out of larger parcel." How did that change the deal?

A: Because we started at 25.

...

Q: When you said, we would segregate, that is Sunrise, correct?

A: That's correct.

Q: Once again, that was conveyed to the Corlisses, correct, that information?

A: yes.

R.P. 85.

John Boe, the former chief financial officer for Corliss Enterprises, testified that Scott Corliss complained that Mr. Halsan had failed to timely file the request for the segregation and that Halsan once again was not doing his job:

Q: Did you have a later discussion with Scott Corliss regarding his response to you about the segregation not getting done?

A: There was a later response that a few months later.

Q: What was Scott's response then?

A: I don't know exactly how this process works, but apparently the application for the segregation was not filed in April. It wasn't filed with the county until July, if I remember right. He just made some comment that he thought that Carl was once again not doing the job that he was supposed to do in a timely fashion.

Q: And "he" being Scott Corliss said this?

A: Yes.

R.P. 226. This testimony demonstrated that not only was it Sunrise' obligation to obtain the segregation, as admitted by Scott Corliss, but that the segregation was supposed to have been done timely. This was affirmed by statements made by Harry Corliss.

Harry Corliss admitted that Sunrise was the party that had the responsibility of obtaining the segregation:

Q: And in your discussions with Harry Corliss, did he make any statements and ask you how he thought that things should have been handled?

A: With Clark McGowan?

Q: Correct.

A: Yes.

Q: What did he tell you?

A: He felt that Clark should be given more time.

Q: Why did he say that Clark should have been given more time?

A: Because the responsibility to do the segregation was a Corliss responsibility.

R.P. 227.

Indeed, it is surprising that Sunrise is taking the extreme position in this appeal that it “gave no thought to the issue of segregation when the PSA was negotiated” in light of the above evidence and in light of the statement Sunrise’ counsel made during closing argument:

I think it’s pretty clear that, obviously, there was a segregation discussed at the time of the negotiations.

R.P. 683.

In light of the overwhelming evidence, and in light of the admission made by Sunrise’ counsel, this Court should reject Sunrise’ argument that the trial court’s finding of fact 11 was without substantial factual support.

**B. The segregation process would ensure that the property would not have to be subdivided by the formal subdivision process.**

As the trial court found, the parties’ intent was that this parcel would be at least twenty acres in size so that it could be subdivided by the segregation process and not by the longer formal subdivision process. (FF 5.)

In its appeal, Sunrise is attempting to portray what the parties intended to achieve was simply a separate tax parcel number. (Sunrise brief, at 9.) Sunrise is attempting to persuade this Court that segregation through RCW 58.17 and Pierce County Code 16.02 does not actually divide the property but instead simply assigns a number to the parcel. (*Id.*) Sunrise' argument contradicts Finding of Fact 5 which Sunrise did not challenge. Finding of Fact 5 was as follows:

At the time the parties entered into the Purchase and Sale Agreement both parties believed that the subject property was approximately more or less 20 acres in size. However, the intent of the parties was that the subject property would be at least 20 acres in size. The subject property was an undivided portion of a 288 acre parcel. Division of subject property 20 acres in size or greater allows the segregation of parcels without having to complete a formal subdivision process. This is permitted pursuant to RCW 58.17 and Pierce County Code 16.02.

Even if Sunrise had challenged Finding of Fact 5, it would still fail because that finding is directly supported by the testimony of Janet Ungers, the person in charge of the segregation process in Pierce County.

Ms. Ungers testified:

Q: There's kind of two different – at least there are two different types of segregation. One is if you purely want a tax parcel number because for some reason you have a chunk of land. Part of it can be taxed at one

rate and another at another rate, but you can get a tax parcel segregation; is that correct?

A: Yes.

Q: Another type of segregation is an exemption of a 20-acre piece where you can actually segregate that out and create a whole new parcel?

A: Correct.

Q: So the request comes in, and someone from your office pulls a map and determines whether or not this thing can be mapped out, first of all, based upon the legal description, correct?

A: Yes.

Q: And they determine the size of the parcels in question because with a 20-acre seg, they have to know it's 20 acres.

A: Yes.

Q: And there are probably some other requirements. There are some other requirements that your office has in order to actually do the segregation.

A: Yes.

Q: And if they don't meet the requirements, then I think as you've just said, whatever terminology, rejected, or you say it can't be done, correct?

A: Yes.

Q: Sometimes they can fix it, and sometimes they can't fix those shortcomings?

A: Yes.

R.P. 472-73.

If the parcel was not at least twenty acres in size, then the segregation request would be denied. (FF 13.) Moreover, if the preliminary plat process had begun with the assumption that the un-segregated parcel was at least twenty acres in size, but it failed to be that large, then the Planning and Land Services department would reject that application. As Ms. Diamond testified when questioned by the trial court:

Q: Now, if the property had gone through and it turned out it was 19.9 acres and not 20, that would not be – that would not be a proper division of property as far as PALS was concerned, correct, because it hasn't gone through the regulatory process for a short plat or what have you?

A: Correct.

...

Q: ... Now, the person that owns the 19.9 comes in and wants to do something about it. You now know that it's not 20 acres. What are you going to do when they come in and want to do some devising of that property further?

A: Prior to continuing – and given the scenario that you have just given me – we would probably cease processing the application until the revisions were done correctly.

Q: And got it up to at least the 20 acres.

A: Correct.

...

Q: As I understand it, you were given an opportunity to try to add to the acreage somehow so there would be 20. In the end, if they can't do it, you would kick the application out. Is that what I'm hearing?

A: A simple reply would be "yes." ...

R.P. 523-24; 526.

**C. Until the segregation process was completed, Sunrise could not have complied with its obligation to provide a correct legal description to Trinity.**

As noted above, this transaction did not involve a situation where the size of the parcel was a secondary issue; instead, the size was critical in that it had to be at least twenty acres. The only way to ensure that the parcel would be at least twenty acres, and thus able to be divided from the parent parcel without going through the formal subdivision process, was the completion of the segregation process. The trial court made such a finding in Finding of Fact 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." Sunrise has challenged that finding of fact. However, once again, there is substantial evidence to support the finding.

Ryan McGowan testified that until the segregation had been approved, there would not be a correct legal description for the property:

Q: Do you regard “segregation” and “a correct legal description” as synonymous?

A: I do because of the fact that we are stating it is a correct legal description. It can't be deemed a correct legal description until it has been reviewed and approved for segregation by the Assessor's Office.

R.P. 48.

Clark McGowan similarly testified:

A: In order to obtain a legal description that I can rely upon, I needed a legal segregation with a parcel number approved by the Pierce County Assessor's Office.

R.P. 296.

Rich Larson testified that until the segregation process is complete, the legal description could change:

Q: When you say once it is segregated, by that you mean a completed segregation that has resulted in a new parcel number being generated for the smaller parcel?

A: That's correct. Because until that happens, all I have is a legal description that could change. That changes everything. That changes all of the applications. And until that piece of property is tied to a parcel number, it's not exact.

R.P. 196. The trial court followed up on this line of questioning to Mr.

Larson:

Q: You were asked about the legal description changing at some point. You weren't sure whether it could change or not because the property had not been segregated?

A: That's correct.

Q: So in the segregation process, the County could require that the tax parcel number run along somehow some different line than the line that has been proposed for the sale?

A: It could happen if, you know, for some reason, it is not 20 acres. The County could ask, you know, for it to change. There is [sic] probably several different reasons. Until it is actually segregated out, it has not gone through that check by the County. They match it with other parcels surrounding descriptions, and they go through a fairly complete check of that with all of their records.

R.P. 215.

Randy Haydon, the engineer retained by Sunrise to drafted the proposed legal description, testified that the draft legal description was subject to revision by the Assessor's office. R.P. 235.

The evidence at trial demonstrated that submitting a segregation request is not automatically granted and that Ms. Ungers, the person in

charge of those requests, has had experiences where there have been errors in the legal descriptions that resulted in the rejection of the requests.

Q: Finally, Ms. Ungers, I did want to ask you a question or two about circumstances that might arise with respect to errors in the legal description submitted with a request for segregation. Has that ever happened before, that is, errors of some sort in the legal description submitted with a request for segregation?

A: Yes.

Q: And to your knowledge, has such errors ever resulted in a request for a segregation being rejected?

A: Yes.

R.P. 470.

Jason Black from Chicago Title also testified that he has seen where the Assessor's Office has rejected a segregation request even after the actual deed has been conveyed for a piece of property.

Q: Certainly, in your experience, you have seen where a deed is recorded with a legal description as provided in the title report and after the deed is recorded and the counter refuses to segregate the property.

A: I have seen that, yes.

R.P. 609.

If the parcel was not at least twenty acres, it could not be conveyed and could not be put through the platting process. As Ms. Diamond testified:

Q: ... Again, if this is 19 acres, again – we are talking in Pierce County. I can't segregate it out by the exception under Pierce County Code 18, correct?

A: Correct.

Q: And so I can't convey that. If I try to convey it, Pierce County is going to say, you illegally divided the property, correct?

A: When it comes to our attention.

Q: Correct. At some point. If somebody tries to submit a preliminary plat application or do any type of development, you will see that it was illegally segregated, correct?

A: Hopefully.

Q: Right? That's the goal, is it not?

A: That's the goal.

Q: And as we said before, this is 20 acres in my 300 acres. I can segregate it out and then convey it and then whoever I conveyed it to can develop it, correct?

A: Correct.

R.P. 509-510.

Here, there was substantial evidence to support the trial court's finding that until the segregation process was complete, the legal

description could not be fixed and thus Sunrise had to complete the segregation process in order to provide, as required by the contract, a correct legal description.

**D. Despite the fact that Sunrise timely failed to provide a correct legal description, demonstrating that in fact time requirements were not of the essence, Trinity prepared the preliminary plat submittal and was ready to file the submittal by the September 4 deadline.**

The purchase and sale agreement provided until June 11, 2003 for Trinity to complete its feasibility study. By that date, Trinity was required to pay Sunrise \$50,000 if it deemed the project feasible. Trinity did so. The agreement required that Sunrise provide Trinity a correct legal description by that date. Sunrise failed to do so. When Trinity tendered the \$50,000 on June 11, 2003, it reminded Sunrise of its obligation to provide a correct legal description.

Sunrise did not even begin the process for obtaining a correct legal description until after June 11. Despite that fact, Trinity retained Rich Larson of Larson and Associates to prepare the preliminary plat application. FF 22. Larson and Associates had all the materials needed to submit the preliminary plat application by the end of August 2003. FF 23.

Larson and Associates, after it had all the materials ready for submittal, were still waiting for the correct legal description to be provided by Sunrise. In other words, Larson was waiting for the segregation of the property.

In 2003, Steve Kamieniecki was the PALS planner responsible for processing applications within the Sunrise Master Plan Community. FF 30. He had held that position since 1997. FF 30. Mr. Kamieniecki, in 2003, held the understanding that a preliminary plat application for an un-segregated parcel, such as the one here, could not be submitted until the segregation process had been completed. FF 32. Mr. Kamieniecki would have been the planner who would have handled this proposed application. FF 32.

Mr. Kamieniecki wasn't the only one with this understanding. Both Rich Larson and his employee, Bill Diamond, held the understanding that this proposed application could not be submitted until the segregation process had been completed.

In this regard, the trial court made three findings of fact. First, it found that Mr. Kamieniecki would have rejected the preliminary plat application if Mr. Larson had attempted to file it. Second, it was reasonable for Trinity and Larson to rely upon Mr. Kamieniecki's statements. Third, through September 2003, both parties believed that Trinity could not submit its preliminary plat application without the property first being segregated. Sunrise has challenged all three findings.

**1. FF 33: Kamieniecki would have rejected an attempt to file a preliminary plat application.**

Once again, it is surprising that Sunrise is taking the position in this appeal that there is not substantial evidence to support the trial court's finding that Kamieniecki would have rejected any attempt to file a preliminary plat application for three primary reasons. First, Sunrise' counsel in closing argument admitted that Kamieniecki held such a belief. Second, Kamieniecki testified to such a belief. Third, Finding of Fact 32 supports Finding of Fact 33 and Finding of Fact 32 is not challenged.

In his closing argument, Sunrise' counsel admitted that Kamieniecki believed that the preliminary plat application could not be filed without the property first being segregated:

They [Larson and Associates] go down and find Mr. Kamieniecki. Sure enough they find the guy that's going to give him the right answer. I'm not saying this is even a setup, Your Honor. I'm just saying that is what happened. You know, Larson really believed it couldn't happen. Kamieniecki, obviously really believed that it couldn't happen without the segregation. Mr. McGowan thought so too.

R.P. 684.

Indeed, that was the only conclusion that could be reached in light of Mr. Kamieniecki's testimony that he told Bill Diamond that Larson and Associates could not submit the preliminary plat application without the property first being segregated. Mr. Kamieniecki testified:

Q: Now, when Mr. Diamond approached you, what did he ask you?

A: If I remember right, they asked me what they needed to submit an application and if they needed a parcel number. I said, yes, he needed a parcel number.

Q: When you said, yes, you needed a parcel number for this 20-acre piece –

...

A: Correct. You would need a parcel number for that piece, correct.

Q: And did you tell Mr. Diamond that they would need that in order to submit their preliminary plat application?

A: Well, yes, I did. Yes.

R.P. 250.

Finally, Finding of Fact 32 directly supports the trial court's

Finding of Fact 33:

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.

Sunrise did not challenge Finding of Fact 32.

Once again, the evidence is overwhelming. Not only did Mr. Kamieniecki believe that an applicant would have to have a segregated parcel, with its own parcel number, but he in fact told Bill Diamond of Larson and Associates, that they could not file this particular preliminary plat application unless they had the segregation completed.

**2. FF 35: It was reasonable for Trinity and Larson to rely upon Mr. Kamieniecki's statements that the preliminary plat application would not be accepted without the subject property being segregated.**

Sunrise is challenging the trial court's finding of fact that it was reasonable for Trinity and Larson to rely upon Mr. Kamieniecki's statements that the preliminary plat application for this property would not be accepted without the property first being segregated and being assigned its own parcel number. FF 35.

In Finding of Fact 30, which is unchallenged, the trial court found that Mr. Kamieniecki was a level two planner 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. In addition, Rich Larson also held the understanding that Pierce County would not accept a preliminary plat application until the subject property had been segregated and assigned its own parcel number. (FF 24) Mr. Larson was an experienced engineer who had been submitting preliminary plat applications on behalf of his clients for twenty-five years. (FF 25)

Mr. Larson was familiar with the preliminary plat application process in Pierce County. (FF 25)

In light of the unchallenged Findings of Fact 24, 25, and 30, it is difficult to conceive of how the trial court erred in finding that Trinity acted reasonably when it relied upon Mr. Kemieniecki's statements.

**3. FF 41: Through September 30, 2003, both parties believed that Trinity could not submit the preliminary plat application to Pierce County without the subject property first being segregated.**

The trial court found that both parties believed that Trinity could not submit the preliminary plat application to Pierce County without the subject property first being segregated. Sunrise is apparently challenging this finding as to evidence supporting the trial court's finding that Sunrise held such a belief. The following evidence provides a substantial basis for such a finding.

As noted above, John Boe testified that Harry Corliss stated that Clark McGowan should be given more time because Sunrise did not get the segregation completed in a timely manner. That statement alone is a sufficient basis to support Finding of Fact 41. It demonstrates that Harry Corliss was under the belief that the segregation was needed in order to file the preliminary plat application and because it was Sunrise' obligation to obtain the segregation, and it failed to do so, that Clark McGowan should be given additional time.

Randy Haydon testified that when Sunrise directed him to start the segregation process, that there was a sense of urgency to getting it done as quickly as possible.

Q: After you received the request signed by Harry Corliss for the segregation, did you receive direction about getting it filed?

A: Just the request to get it submitted. I mean, it wasn't like the first hour, or whatever, It was given to me, and I was expected to turn it in as soon as possible. I mean, there was no request per se to – like, today or tomorrow, but it was done at about that.

Q: Someone said something to you to convey some sense of get it done as quickly as possible?

A: Yes.

R.P. 239-40. This supports the fact that Sunrise, at that time, believed that the segregation was necessary in order for the preliminary plat application to be filed and thus it had been done “as quickly as possible.” If Sunrise did not hold the belief that the segregation was needed before the deadline for filing the preliminary plat application, then there would be no such urgency.

Clark McGowan testified that he told Carl Halsan that Trinity needed to have the property segregated in order to file the preliminary plat application. R.P. 300-301. Halsan never told him that he didn't need to

have a separate parcel number to submit the preliminary plat application. R.P. 301. Nor did Halsan ever tell Mr. McGowan that there was an exception because this was a master plan community. R.P. 301. Instead, Mr. Halsan told Mr. McGowan that the segregation application was being processed and that it would be provided prior to the time that Mr. McGowan needed to submit the preliminary plat application. R.P. 302. Clark McGowan asked Carl Halsan numerous times about the status of Sunrise obtaining the segregation especially as the deadline drew near for the filing of the preliminary plat application. R.P. 303.

Carl Halsan admitted that Clark McGowan asked him about Sunrise obtaining the segregation of the property and asking that it be hurried up:

Q: And, finally, sir, I wanted to ask you if you agree with Mr. McGowan's testimony that he asked you if you could please check on the segregation status with the Assessor's Office and asked you further if you could personally go down to the Assessor's Office and do something to get it complete so that you could provide him with a parcel number?

A: I do remember him calling and asking about – is the seg in the works? What's the status? Can you hurry it along? I don't remember the – in talking about the last part, so I could provide him with a parcel number.

R.P. 548-49.

Finally, after Sunrise terminated the agreement on September 5, 2003, the parties met on September 10, 2003 to discuss the termination. FF 39. Clark and Ryan McGowan, Harry and Scott Corliss, John Boe, and Carl Halsan, among others, were present at that meeting. R.P. 28. Two significant facts arose from that meeting. At that time, Sunrise was not even contending that it was Trinity's duty to obtain the segregation. R.P. 28-29. Second, at no time after that meeting did Sunrise ever take the position that the preliminary plat application could be submitted without the segregation being accomplished. Indeed, Sunrise never took such a position until after litigation was commenced.

In Exhibit 12, the McGowans followed up the meeting of September 10 with a letter affirming that they had everything necessary to file the preliminary plat application except a legal description and parcel number for the new twenty-acre parcel. Sunrise responded by a letter dated October 10, 2003. (Exhibit 66.) In that letter, once again Sunrise never alleged that the preliminary plat application could have been submitted without the property being segregated. Once again, this demonstrates that in that time period, Sunrise was also under the belief that the property had to be segregated in order to file the preliminary plat application. If it held a contrary belief, then it would have stated that in the letter.

**II.**  
**SUNRISE WAIVED ITS RIGHT TO ENFORCE THE TIME IS OF**  
**THE ESSENCE CLAUSE.**

The trial court properly found that Sunrise waived its right to enforce the time is of the essence clause.

Sunrise concedes that it did not comply with the very first time deadline imposed by the agreement: to provide a correct legal description by June 11, 2003. In his closing argument, counsel for Sunrise admitted that Sunrise did not comply with the contractual terms of the PSA – it failed to provide a correct legal description prior to June 11, 2003.

I realize that this [Sunrise' failure to provide  
the legal description by June 11] is  
inconsistent with the terms of the agreement.

R.P. 677.

Sunrise' failure to abide by the clear contractual terms had to have consequences: it was either a breach of the agreement or it resulted in the waiver of strict adherence to the time deadlines set forth in the agreement. The trial court determined that Sunrise waived strict adherence to the time deadlines.<sup>1</sup>

Waiver is the intentional abandonment or relinquishment of a known right. It must be shown by unequivocal acts or conduct showing an

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<sup>1</sup> As stated above, Sunrise either waived time is of the essence or it breached the contract. If breach, then it would still be liable to Trinity as it was this breach that was a cause of Trinity not meeting the deadline to file the preliminary plat application which is the only basis for Sunrise terminating the contract. Under either analysis, the judgment in favor of Trinity and against Sunrise should be upheld.

intent to waive, and the conduct must also be inconsistent with any intention other than to waive. *Dep't of Rev. v. Puget Sound Power & Light Co.*, 103 Wn.2d 501, 505, 694 P.2d 7 (1985).

Here, the unequivocal act by Sunrise was its failure to provide the correct legal description by June 11. If the time deadlines were of the essence, then it would have adhered to the first deadline under which it was obligated to perform. It unequivocally failed to do so. There is only one conclusion to be drawn by Sunrise' act: the time deadlines were not critical to the parties.<sup>2</sup>

A case on point is *Reynolds Metals v. Elec. Smith Constr.*, 4 Wn. App. 695, 483 P.2d 880 (1971). There, Reynolds and Electric Smith entered into a contract where Reynolds would supply copper and aluminum components which Electric Smith would fabricate and assemble. Electric Smith was to begin shipping complete pot bus assemblies by October 1, 1967 and by November 1, 1967 maintain a production rate of 20 assemblies per week. The contract had a term

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<sup>2</sup> Conceivably, Sunrise could have argued that the ultimate closing date was the critical time period for it after Trinity tendered the \$50,000 deposit and that it never intended to waive the ultimate closing date. However, an interim date for the filing of the preliminary plat application did not benefit Sunrise – it did not provide it with any additional moneys nor did it in any way alter the ultimate closing deadlines imposed by the purchase and sale agreement. Sunrise may have been able to take the position that because if failed to meet the initial deadline, it could still enforce the ultimate closing date deadline. (This, however, would be subject to argument but again, looking at it logically, perhaps Sunrise could have made this argument.) It failed to do that. Instead, it simply terminated the agreement the day following the original deadline date for the filing of the preliminary plat application.

declaring that time was of the essence. Electric Smith never met the production schedule.

Reynolds unilaterally terminated the contract. Electric Smith claimed that Reynold's unilateral termination was a breach of the contract. In turn, Reynolds claimed that Electric Smith breached the contract by failing to meet the production schedule.

At a bench trial, the court found that Reynolds had wrongfully terminated the contract and thus was liable for breach of contract. The trial court found that Reynold's conduct materially contributed to Electric Smith's failure to meet the production schedule.

On appeal, the court of appeals affirmed the trial court's judgment.

As an initial matter, the court of appeals held that if a contract requires performance by both parties, the party asserting nonperformance by the other must establish his own performance.<sup>3</sup> *Id.* at 698. The court of appeals held that there was substantial evidence to support the trial court's factual finding that Reynold's actions "substantially and materially contributed to the causes of Electric Smith failing to meet its production schedule." *Id.* at 699.

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<sup>3</sup> Here, Sunrise fails to meet this initial requirement.

Reynolds next argued that Electric Smith waived its right to rely upon Reynold's earlier breach in defense of its own later failure to meet the agreed production schedule.

The court of appeals rejected this argument.

The court of appeals quoted Corbin on Contracts for the proposition that the term "waiver" has various definitions, depending on the context of the dispute:

The term "waiver" has been given various definitions; the fact is that it is used under many varying circumstances. There is no one "correct" definition; it can not be defined without reference to the kind of circumstances to which it is being related. Nor can we determine the legal operation of a "waiver" without knowing the facts that the term is being used to describe.

*Id.* at 700, quoting, 3A A. Corbin, Contracts § 752 (1960).

The court noted that it "is elementary that either party to a contract may waive any of the provisions made for his benefit." *Id.* at 700. The court also noted that waiver may be implied from a party's conduct.

Subject to the qualification that to be effectual a waiver of a stipulation in an agreement must not only be made intentionally, but with knowledge of the circumstances, contract provisions may be waived expressly or the waiver thereof may be implied from the acts of the parties.

*Id.*

Finally, the court of appeals noted that whether or not there is an implied waiver is a mixed question of fact and law:

[Waiver] is essentially a matter of intention. ... Commonly, it is sought to be proved by various species of proofs and evidence, by declarations, by acts and by non-feasance, permitting differing inferences and which do not directly, unmistakably or unequivocally establish it. Then it is for the jury to determine from the facts as proved or found by them whether or not the intention existed. ... If the established facts permit reasonable minds to differ as to the inferences or effects from them, a question of fact arises. When 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.* at 700-701, quoting, *Alsens American Portland Cement Works v. Degnon Contracting Co.*, 222 N.Y. 34, 37, 118 N.E. 210 (1917).

The same fact pattern, and factual findings, are present here. Sunrise's failure to provide a correct legal description, which entailed segregation of the property, was a material and substantial cause of Trinity's inability to file its preliminary plat application. The trial court found, as a factual finding, that Sunrise waived its right to enforce the time is of the essence provision of the contract. In other words, the trial court found that Sunrise' conduct, taken in context of all the evidence,

demonstrated that it did not intend to abide by that requirement and thus waived that requirement.

Another case demonstrating waiver is *Weber Construction, Inc. v. Spokane County*, 124 Wn. App. 29, 98 P.3d 60 (2004). There, the defendant hired the plaintiff to build a road. The plaintiff did not finish on time or within budget because it encountered large boulders it was unable to use to create fill. The trial court granted judgment in favor of the defendant at the close of plaintiff's case on the basis that the plaintiff did not comply with the contract procedure for filing a claim. The court of appeals reversed the trial court's ruling on appeal. The matter went to the State Supreme Court where that Court remanded the case to the court of appeals with directions for that court to reconsider its decision in light of *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, 78 P.3d 161 (2003). The court of appeals then reversed the trial court's ruling and remanded the case for a new trial.

The court of appeals held that it was a factual issue whether or not the plaintiff complied with the protest and claim procedures. Moreover, and the relevant holding for this dispute, the court held it was a factual issue of whether the defendant, by its conduct, waived strict compliance with the claims procedures. *Id.* at 35.

Here, it was a question of fact whether Sunrise waived the requirement that time requirements had to be strictly met. There was

substantial evidence in the record to support the trial court's factual finding that in fact Sunrise waived that requirement. That ruling should be upheld.

Sunrise spends a substantial amount of time arguing to this Court that the facts support its theory that waiver did not occur. (See Sunrise brief, pp. 29 to 32.) However, as noted earlier in this brief, there is substantial evidence to support all of the trial court's factual findings. Sunrise is mistaken by attempting to re-argue factual disputes at the appellate level.

Sunrise cites *Mid-Town Partnership v. Preston*, 69 Wn. App. 227, 848 P.2d 1268 (1993) in support of its argument that it did not waive its right to enforce the time is of the essence clause. However, as the court made clear in *Preston*:

CAYA [the defendant] was never in breach of the sale agreement. It did nothing that could be interpreted as a waiver of the June 1 closing date, nor of the time is of the essence clause.

*Id.* at 236.

In contrast, here, Sunrise itself failed to meet the first deadline demonstrating that the initial deadlines were not critical to the agreement.

Here, there was substantial evidence to support the trial court's finding of waiver. Sunrise was contractually obligated to provide a correct legal description by June 11. It failed to do so. Despite that fact, it,

together with Trinity, continued on with the terms of the contract. Indeed, Sunrise quickly filed the application to have the property segregated and continually told Trinity not to worry, that the segregation process was taking place. Trinity spent between \$50,000 and \$100,000 to prepare the preliminary plat application and was ready to do so but could not because Sunrise still had not fulfilled its obligation to have the property segregated. This all demonstrated that time was not of the essence for Sunrise and the trial court, looking at all the evidence, made that factual finding.

It is well-settled law that strict enforcement of a contractual requirement that time is of the essence can be waived by conduct. *Reeploeg v. Jensen*, 5 Wn. App 695, 698, 490 P.2d 445, (1972), *reversed on other grounds*, 81 Wn.2d 541 (1972). Here, there is substantial evidence to support the trial court's conclusion that by failing to meet the initial deadline, and yet proceeding with the terms of the agreement, the parties both waived strict enforcement of the time deadlines.

Sunrise mentions that waiver was not specifically pled by Trinity. However, Trinity's action was based upon the contract and the fact that Sunrise waived one portion of the contractual provisions fell within the scope of the breach of contract claim. Moreover, as the State Supreme Court has held:

It is a general rule of appellate practice that the judgment of the trial court will not be reversed when it can be sustained on any

theory, although different from that indicated in the decision of the trial judge.

*Sprague v. Sumitomo Forestry*, 104 Wn.2d 751, 758, 709 P.2d 1200 (1985). The underlying reason for this rule is that as long as the factual disputes were fully explored at the trial court level, then the application of the law to those facts is appropriate.<sup>4</sup> Here, the disputed facts as to the breach of contract claim were the same as those used by the trial court to find waiver of the time deadlines.<sup>5</sup>

**III.**  
**SUNRISE IS EQUITABLY ESTOPPED FROM**  
**STRICT ENFORCEMENT OF THE TIME REQUIREMENT.**

Sunrise is contending that the evidence at trial was not sufficient to establish that Sunrise should be equitably estopped from strictly enforcing the time requirements of the contract. Once again, the evidence belies that contention.

In order to find equitable estoppel, a court must find the following elements:

- (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

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<sup>4</sup> See also *King v. Snohomish County*, 105 Wn. App. 857, 865, 21 P.3d 1151 (2001)(party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the basis as provided in RAP 2.5(a)), *reversed on other grounds*, 146 Wn.2d 420 (2002).

<sup>5</sup> Sunrise failed to object to the conclusions of law regarding waiver and equitable estoppel as not being raised by the pleadings at the time the trial court made its ruling or thereafter.

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).

Here, the act was Sunrise' failure to adhere to the first time deadline when it was obligated to provide a correct legal description to Trinity, together with it continuing on with the carrying out of the conditions of the contract. Trinity relied on this act, Sunrise' clear showing that time was not of the essence in meeting the contractual deadlines, by proceeding with the requirement of the contract and expending \$100,000 in costs to carry out the terms of the contract. This was in addition to the \$50,000 initial deposit. Trinity would be injured if Sunrise were allowed to contradict its earlier action of itself ignoring deadlines and instead insist on strict adherence to deadlines. Accordingly, the trial court properly found that Sunrise was equitably estopped from claiming that time was of the essence for the contractual deadlines.

#### IV.

#### **THE DUTY OF GOOD FAITH PREVENTED SUNRISE FROM TERMINATING THE CONTRACT ON SEPTEMBER 4.**

Sunrise is contending that the duty of good faith and fair dealings does not require a party to a contract to agree to different contract terms. That, however, is not the issue in this dispute. Instead, the issue is whether, once Sunrise failed to abide by the first deadline of June 11 to

provide a correct legal description, does the duty of good faith and fair dealing prevent Sunrise from terminating the contract based upon an interim deadline that did not affect the ultimate closing date. The trial court answered the issue in the affirmative. That ruling should be upheld.

In every contract, there is the implied duty of good faith and fair dealing. *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). “This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.” *Id.* Evasion of the spirit of the bargain is a violation of the duty of good faith and fair dealing. *See, Scribner v. World.com*, 249 F.3d 902, 910 (9<sup>th</sup> Cir. 2001).

Sunrise argues that it “had no discretionary authority to set the “null and void” date of ¶8 – the contract clearly established the date as September 4.” (Sunrise brief, p. 42.) Sunrise argues that it accordingly could demand that the deadline be strictly adhered to. What Sunrise continually fails to acknowledge, however, is that it had no discretionary authority to determine not to meet the original deadline date of June 11 to provide a correct legal description. The trial court correctly determined that the duty of good faith, under these circumstances, prevented Sunrise from simply terminating the contract on September 5.

V.  
**SUNRISE IS REQUESTING THIS COURT TO  
MAKE A FACTUAL DETERMINATION THAT  
THE DEADLINE FOR FILING A PRELIMINARY PLAT  
APPLICATION WAS A CONDITION PRECEDENT.**

Sunrise is contending that the September 4 deadline for filing a preliminary plat application was a condition precedent. However, such a legal conclusion would require a factual finding of the parties' intent – a factual finding that was not made at the trial court level.

As Sunrise acknowledges, “whether a provision in a contract is a condition, the nonfulfillment of which excuses performance, depend upon the intent of the parties.” (Sunrise brief, p. 43, citing, *Tacoma Northpark, LLC v. NW, LLC*, 123 Wn. App. 73, 80, 96 P.3d 454 (2004)). Here, there was no factual finding by the trial court that the parties intended that non-performance of this condition would excuse all future requirements under the contract. Moreover, Sunrise once again ignores the fact that it failed to meet its first contractual obligation within the deadline stated in the contract.

VI.  
**THE TRIAL COURT PROPERLY AWARDED TRINITY  
SPECIFIC PERFORMANCE.**

Sunrise raises as error the trial court's award to Trinity specific performance of the contract. However, Sunrise merely devotes one paragraph, in its section on condition precedent, alleging that the trial court was incorrect in ruling that Sunrise is getting its payment sooner

than it would have under the original contract terms. Obviously, in terms of simple passing of days, Sunrise is receiving payment later than it would have had it not improperly terminated the contract. By it improperly terminating the contract, it delayed the payment. However, in terms of contract terms, it is receiving payment earlier than it would have otherwise. Under the original contract terms, it would not receive payment until approximately nine months after Trinity filed its preliminary plat application. If the original contract terms were enforced, Trinity would have the contractual right to submit the preliminary plat application and then have nine months in which to close. However, Sunrise argued at the second phase of the trial that specific performance would be unfair because the Pierce County regulations had changed to where a party could not submit a preliminary plat application unless that party was the owner of the property. Sunrise argued that it would thus be required to convey title to Trinity, to allow Trinity to file the preliminary plat application, but would not receive payment for another nine months. As that was the sole argument being advanced by Sunrise as to why it was objecting to specific performance, Trinity agreed to simply pay the funds without it having the benefit of being able to file the preliminary plat application.

Sunrise has not demonstrated that the trial court erred in awarding specific performance. The trial court's ruling that specific performance should be granted should be upheld.

**VII.**  
**TRINITY IS ENTITLED TO AN AWARD OF ATTORNEY**  
**FEES AND COSTS IT INCURRED AS A RESULT OF THIS**  
**APPEAL.**

Trinity was awarded its attorney fees and costs at the trial level pursuant to the purchase and sale agreement which provides:

If Purchaser or Seller commence a lawsuit to collect any earnest monies or 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.

Trinity requests this Court to award it the attorney fees and costs it incurred in this appeal.

**CONCLUSION**

As Sunrise' counsel admitted during closing arguments:

I realize that this [Sunrise' failure to provide the legal description by June 11] is inconsistent with the terms of the agreement.

As noted earlier, Sunrise' failure to abide by the June 11 deadline was either a breach or a waiver of the time requirements – the trial court found the latter. The trial court found that the unequivocal act of Sunrise

not meeting the first time deadline together with proceeding with the contract terms, demonstrated that the time deadlines, to Sunrise, were not of the essence.

Moreover, there is no evidence that the date that Trinity was to file the preliminary plat application was for the benefit of Sunrise. In other words, this was not a contract that tied the closing date to a certain number of days after the preliminary plat application was filed or a certain number of days after the preliminary plat application was granted. The key date, for Sunrise' benefit, was the closing date – an independent date. Showing its lack of good faith, Sunrise never took the position that because it failed to meet the first deadline, that it would not enforce the interim deadline but would enforce the ultimate closing date deadline. At least that may have been an arguable position since the closing date was for its benefit while the preliminary plat filing date was of no material benefit to Sunrise.

Sunrise instead took the position in dealing with Trinity that Sunrise could miss contractual deadlines but that it had the right to strictly hold Trinity to a deadline that did not benefit Sunrise and if Trinity missed that date, for whatever reason, it, Sunrise, had the right to terminate the contract. This does not comport with the principles of good faith and fair dealing.

Moreover, here, the reason Trinity could not comply with the deadline was because Sunrise failed to meet its contractual obligation of providing a correct legal description by June 11.

The trial court properly found in favor of Trinity. Trinity requests this Court to affirm the trial court's ruling and to award Trinity its attorney fees and costs incurred in this appeal.

Dated this 9 day of March, 2007.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

STATE OF WASHINGTON  
BY   
DEPUTY

The undersigned certifies that on the 9<sup>th</sup> day of March, she placed with ABC Legal Messengers, Inc. a true and correct copy of the Respondent's Brief for hand delivery to counsel of record:

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