

NO. 36391-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SOUTHRIDGE SILVER CREEK, LLC
and JOHN DOES and JANE DOES 1 through 10,
Appellants

v.

EVERGREEN STATE BUILDERS LLC,
And CONIFER HOMES, LLC
Respondents

RECEIVED
COURT OF APPEALS
DIVISION II
JAN 14 2014

BRIEF OF RESPONDENT CONIFER HOMES

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STATEMENT OF THE CASE

This is an action by Conifer Homes LLC (hereinafter “Conifer”) to collect back from the defendant, Southridge Silver Creek LLC (hereinafter “Southridge”) \$300,000 in earnest money that was paid by Conifer under a Real Estate Purchase and Sale Agreement (hereafter “REPSA,” a copy of which is attached as appendix 1) that was terminated by Conifer as Conifer had the right to do when Southridge could not produce finished lots by the closing date. The REPSA was drafted by defendant seller, Southridge. (CP 332) The typewritten version of the REPSA listed Evergreen State Builders LLC as the purchaser. A handwritten change was made to the document allowing the purchaser to be Conifer. (REPSA, p.1, CP 185) Conifer paid the earnest money and was to be the purchaser at closing. (CP 332) Southridge continues to state that Evergreen State Builders was the purchaser even though they are well aware that the purchaser was Conifer, that the earnest money was paid by Conifer, (CP 332), and the judgment in the trial court was in favor of Conifer. (CP 341)

At the time of the execution of the REPSA, the property was neither platted nor improved. As a result, the REPSA did not pick a set closing date. Instead, it allowed Southridge a window of time in which to complete the plat improvements, record the plat, and obtain a decision

from the Hearing Examiner approving the final plat so the property could be closed with lots that were finished for the purpose of applying for a building permit.

Paragraph 7.2 of the REPSA addresses the issue of closing. It states:

Closing shall occur fifteen (15) days following the date on which the final plat for lots in phase 18 -- Silver Creek is recorded at the Pierce County Auditor's office, but in no event sooner than December 1, 2005 or later than July 30, 2006 (the "outside closing date").

Since paragraph 7.2 mandated closing to occur 15 days after the recording of the final plat, Southridge, the developer of the property, could control the closing date by choosing when to record the plat. They could even extend the outside closing date and extend the time that they had to record the plat and close the sale under paragraph 7.3 of the Agreement which states:

If Seller, despite using good faith efforts, has not completed the final Plat Approval at least ten (10) days prior to the Outside Closing Date specified herein, then (i) Seller shall not be deemed in default hereunder, (ii) at Seller's sole option this Agreement shall terminate on the Outside Closing Date, and (iii) if terminated by Seller, the Earnest Money shall be refunded to Purchaser; provided, however, Seller may, by written notice to Purchaser delivered on or before the outside Closing Date, extend the Outside Closing Date for up to six (6) months in order to provide

additional time to achieve Final Plat recording and complete the Finished Lot work.

Although the seller could extend the outside closing date under paragraph 7.2 of the REPSA, once the plat was recorded closing was required to take place within 15 days. No contract provision allows the extension of the closing date once the plat was recorded.

The recording of a plat is done by a party platting a parcel of property and the date of the recording is therefore completely in that party's control. In this case, Southridge elected to record the plat on March 16, 2006. (CP 89, 90) That recording date mandated a closing date under the REPSA of March 31, 2006.

Getting a plat recorded does not mean that Pierce County will accept building permits for the lots within the recorded plat. (CP 228) Normally, before building permits may be applied for, each of 6 county departments must enter approval of the plat improvements in the county computer system by the entry of "AP" in the county records related to the plat and the Hearing Examiner must enter his decision approving the final plat. (CP 227-229)

The 6 departments that must approve the plat work for the final plat to be approved are Planning, Utilities, Assessor/Treasurer,

Development/Engineering, Fire Marshal, and Cartographer. Those departments approved the work they certify on the Southridge plat by inputting “AP” in the county computer system on the following dates (CP 228):

Cartographer	October 31, 2005
Fire Marshal	March 10, 2006
Development/Engineering	March 10, 2006
Planning	March 14, 2006
Assessor/Treasurer	March 14, 2006
Utilities	May 4, 2006

The Hearing Examiner approved the final plat on May 8, 2006. (CP252) In order for him to do that, a hearing was held before him and he issued his decision upon the request to approve the final plat. (CP 250-252) At the hearing, the Hearings Examiner took evidence to determine whether Southridge had completed the conditions of approval for the plat as set forth in his decision approving the preliminary plat of the property and whether the plat complied with state law and the Pierce County subdivision ordinance. (CP 252) The hearing for approval of the final plat took place on March 16, 2006. (CP 251) He issued his decision approving the plat on May 8, 2006. (CP252) Typically, but not always, the final plat

is recorded by the developer before the Hearing Examiner enters a decision that the plat is final. (CP 227) The plat is not complete and final until the Hearings Examiner issues a decision approving the final plat. (CP 227)

The Hearings Examiner's decision approving the final plat is a critical date to a developer because that is normally the date that the county can accept building permits for homes on the platted property. (CP 227- 229) In this case, Southridge made a request to the Pierce County Development/Engineering supervisor asking that building permits be available before approval of the final plat. (CP 230, 231) The supervisor made special arrangements approving issuance of building permits for some of the lots within the Southridge plat prior to the final plat being approved by the Hearing Examiner, allowing building permits to be issued for a limited number of lots within the plat. (CP 230, 231) This issuance of permits was unique in the 19 years the permit supervisor worked for Pierce County and was described by the permit supervisor for Pierce County as:

That this was a unique review, done by this supervisor, that this was okay in this situation, unique to this plat. (CP 230, 231)

Despite getting unprecedented approval to get building permits for some of the lots within the plat, Southridge was not able to get approval to get building permits for the lots purchased by Conifer before the final plat was approved. (CP 230, 231) It is not disputed the building permits were not available for the lots purchased by Conifer until after the May 8 decision approving the final plat was issued by the Hearings Examiner.

Paragraph 17.1 of the Purchase and Sale Agreement requires the seller to provide "finished lots" prior to closing. Paragraph 17.2 of the REPSA defines finished lots to include three provisions. To be finished lots have to be:

1. In a condition that made them complete for the purposes of submitting a building permit; and
2. That there be no restrictions preventing the issuance of building permits related to seller's obligations in the final plat; and
3. The seller shall have substantially completed all plat improvements identified in paragraph 17.2 or in the alternative, to have bonded those improvements.

On March 13, 2006 Southridge gave Conifer a written notice that the plat had been recorded and demanded closing within 15 days. That letter states:

We have achieved Final Plat for Phase 18 (Southridge) and your lots are complete. This written notice is given so that you may prepare for Closing within 15 (fifteen) days.

We will work with you to get Closing documents together for March 28, 2006. Shelley Anderson at Stewart Title (206-770-8811) is the Closing Agent. Chicago Title is providing title policies. (CP 129)

The statements in the letter of March 13 were false. The plat had not been recorded and was not recorded until March 16, 2006. (CP 89, 90)

The owners of Conifer Homes, upon receiving the notice, learned that Pierce County would not issue building permits on the lots purchased by Conifer because the decision of the Hearing Examiner approving the final plat had not been issued. They also learned that the water system was not operational so that it could be hooked up to homes. Upon learning that the lots were not in a condition to provide for building permits as required prior to closing and upon learning that it was not possible for the water purveyor to dispense water to homes because the water purveyor had not taken ownership of the water system or provided a water availability letter, Conifer determined that the lots were not "finished" as required by paragraph 17.2 of the REPSA and exercised its right under paragraph 8.2 of the REPSA and terminated the agreement by sending a letter from an attorney outlining their position. (CP 131, 132) That letter referred to

paragraph 8 of the Agreement. Specifically, paragraph 8.2 states, in the relevant portion:

So long as the party is not in default hereunder, if any condition to such party's obligation to proceed with the Closing has not been satisfied or waived as of Closing date or such earlier date as provided herein, such party may, in its sole discretion, terminate its obligations under this Agreement by delivering written notice to the other party on or before such date, or such party may elect to close notwithstanding the non-satisfaction of such condition, in which event such party shall be deemed to have waived any such condition (but regardless of which election such party makes, such party shall not thereby be deemed to have waived its rights and remedies against the other party for its failure of performance or breach of its representations and warranties except as otherwise provided in this Agreement). The terms of this Section shall survive termination or closing of this Agreement.

The March 28 letter states that Conifer was opting to terminate the Agreement as it had a right to do under paragraph 8.2 of the REPSA. It also demanded the return of the \$300,000 earnest money paid to Southridge. Southridge terminated the agreement but kept the earnest money.

Following the refusal by Southridge to return the earnest money, Southridge entered into another Purchase and Sale Agreement. It sold the same lots it had contracted to sell to Conifer to a third party for \$127,500 per lot, or \$4,205 per lot more than they had agreed to sell the same lots to

Conifer. (CP 23-24) That closing took place on May 26, 2006 after the final plat had been approved and building permits could be issued. (CP 23)

Conifer moved for summary judgment in the trial court, asserting that it was entitled to terminate the Agreement under paragraph 8.2 on two bases. It argued that the lots were not finished lots by March 28, 2006, the date that Southridge asserted closing was to take place by their false statement that recording had occurred on March 13 and that they were not finished lots for the same reason on March 31 when the closing should actually have occurred. Conifer also moved for summary judgment on the ground that the lots were not finished lots under paragraph 17.2 of the REPSA because water service was not available to the lots being purchased by Conifer until May 30, 2006.

In its response to Conifer's first ground for summary judgment, that the lots were not finished because Pierce County would not accept building permit applications for the Conifer lots at closing, Southridge conceded in its brief at the trial court in response to the motion for summary judgment that Pierce County would not accept building permit applications on lots purchased by Conifer until May 8, 2006. (CP 145) Southridge argued alternatively that the REPSA did not require that building permits be available for the lots prior to closing or that the Force

Majeure provision of the contract allowed them to extend the time by which they were required to produce finished lots. (CP 143-145)

In response to Conifer's motion for summary judgment based on the fact that the lots were not finished lots because the water system was not "operational", Southridge argued in the trial court that the water system improvements were in the ground and the system had been tested and that therefore it was operational even though the water purveyor could not dispense water until the water availability letter was signed agreeing that the water purveyor had taken over control of the system so that water could be dispensed to customers. Southridge also argued that Conifer was guilty of anticipatory breach which relieved Southridge of its obligations under the contract and that the failure to provide finished lots, if there was one, was a "minor" breach which did not justify termination the contract.

The trial court ruled that the plain language of the contract, which had been drafted by Southridge, required the lots to be in a condition so that building permits could be obtained to be "finished lots" under paragraph 17.2 of the Agreement. It further ruled that since closing was required to occur within 15 days after Southridge elected to record the final plat, that the failure to provide lots upon which building permits could be issued by the county by the closing date relieved Conifer of the

obligation to close and allowed Conifer to terminate the agreement and receive the return of its earnest money under paragraph 8.2 of the REPSA.

The trial court also ruled that the requirement of the REPSA in paragraph 17.2(i) that Southridge provide utilities including water that were "operational and energized" was not satisfied because it was undisputed that a water availability letter had not been issued by the water purveyor allowing it to provide water to homes. The trial court granted summary judgment on both theories advanced by Conifer.

ARGUMENT

FACTS NECESSARY TO UPHOLD CONTRACT TERMINATION ARE UNDISPUTED

Although it asserts that there are undisputed facts in this case Southridge admits in its opening brief the 3 facts that are necessary for the court to uphold the summary judgment. Southridge admits at page 17 of its opening brief that the REPSA required Southridge to provide finished lots within 15 days of final plat recording. Since final plat recording took place on March 16, 2006, they were required to provide finished lots by March 31, 2006. Southridge admits at page 13 of its opening brief that to be finished lots, the lots were required to be "complete for purposes of

submitting building permits”. Finally, they admit at page 14 of their opening brief that building permits were not available on the lots by closing. Despite those admissions, they argue that the Conifer lots were finished lots because, they allege, the delay in approving the final plat and allowing building permits to be issued was Pierce County’s fault, not the fault of Southridge.

The starting point in determining whether the lots were finished lots by the required closing date is the definition of “finished lots” contained in paragraph 17.2 of the REPSA. That states, in the relevant portion:

As used herein, “finished lots” shall be in a condition that makes the lots “complete” for the purpose of submitting a building permit **and** there are no restrictions preventing the issuance of building permits that are related to the seller’s obligations in the final plat.

That language is conjunctive. The use of the word “and” in the paragraph 17.2 definition of “finished lots” used by Southridge when it drafted the REPSA means that to be “finished lots” the platted lots sold to Conifer must meet the requirements of both clauses of the first sentence of paragraph 17.2. W. Ports Transportation, Inc. v. EMP. Security, 110 Wn.App. 440, 41 P.3d 510 (2002).

Throughout this litigation, Conifer has argued that the first clause of paragraph 17.2 requires Southridge to have the platting process complete as required by Pierce County for the issuance of building permits. The contract was drafted by Southridge and if there is any ambiguity in it, it must be construed against Southridge. Universal /Land Construction v. Spokane, 49 Wn.App. 634-637, 745 P.2d 53 (1987). Southridge has neither argued that paragraph 17.2 is ambiguous, nor offered any interpretation of the first clause of paragraph 17.2 other than to state a requirement that the plat be finalized to the point that building permits would be issued on the Conifer lots by the time of closing. Yet, after admitting in its opening brief that the REPSA requires the lots to be complete at closing for the purpose of building permits, Southridge argues that it had substantially completed the physical work on the lots that was necessary to put them in a position to have the county go through the process to approve the finished plat. They argue that finishing their physical work their made the lots finished lots even though the county had not gone through the process to verify that the plat work was done and issued a decision that the plat was final so that building permits could be issued. That argument asks the court to ignore the first clause of paragraph 17.2 and enforce only the second clause of that paragraph, which requires

that there be no restrictions preventing the issuance of building permits that are related to seller's obligations in the final plat. In making its argument, Southridge is impliedly claiming that the first clause and second clause of paragraph 17.2 have the same meaning. They argue that both provisions together mean only that to be finished lots, Southridge must have finished its physical work on the lots. That argument ignores the fact that until the Pierce County Hearings Examiner issues a decision that the plat work is done the plat is not completed or final and building permits are not available. Such an interpretation would render the first clause of paragraph 17.2 completely meaningless. Contracts are to be interpreted in a way that gives meaning to all contract provisions. Wagner v. Wagner, 95 Wn.2d 94, 621 P.2d 1279 (1980). If, as Southridge argues, the first clause of paragraph 17.2 and the second clause of paragraph 17.2 of the REPSA have the same meaning, there would be no point in having both clauses in the agreement. The use of the word "and" is conjunctive and means that both of those tests must be met. The correct interpretation of the first clause of paragraph 17.2 is that it requires the plat to be completed and final so that building permits are available by closing. It is not disputed that that did not happen. Summary judgment was appropriate.

Southridge attempts to argue that it was Pierce County's fault that

final plat approval had not been issued by the Hearing Examiner and that building permits were not available by the required closing date because the county took too long to get the final plat approved or because the county refused to accept building permits on the Conifer lots when it was accepting other lots within the plat. Even there was county delay in approving the final plat, that would not preclude Conifer from exercising its rights to terminate the REPSA. The language of the first clause of paragraph 17.2 of the REPSA is unconditional. The REPSA states that to be finished lots, the lots must be complete so that building permits are available for those lots. Delay by the county in the issuing of final plat approval is not an exception to the obligation of Southridge to provide finished lots at closing . The language of paragraph 17.2 requiring finished lots at closing is critical to a buyer because of the cost of delay in being able to start construction to a home builder. As an example, the purchase price for the 77 lots in this case was \$9,493,715.00. If a builder buys those lots and cannot build on them because building permits cannot be obtained, and his loan rate is 8%, the interest carry while holding lots that cannot be used is \$63,291.00 per month. The cost of loan money or the loss of return on owner capital invested in unproductive lots makes the ability of a buyer of single-family building lots to build immediately after

closing critical to the profitability of the homes. Paragraph 17.2 of the REPSA requires the lots to be complete for issuance of building permits at closing. That requirement was an important condition of the REPSA. Southridge attempted to shift the holding costs of the lots by forcing Conifer to close on the lots before building permits were available. Conifer elected to exercise its right under paragraph 8.2 of the REPSA rather than close on lots where building permits were not available.

In its argument alleging that the Conifer lots were finished lots by the closing date and that it was county error to refuse to issue building permits on them, Southridge goes so far as to state in their opening brief, at page 14:

For some reason, the permits for the other 86 non-Evergreen lots were issued despite the fact that no Examiner's Report had been filed.

Although they make that argument, no evidence in the record demonstrates that building permits were available on any lots within the plat by March 31, 2006, the date they were required to be available to Conifer. Indeed, permits became available on the other lots within the plat on April 3, 2006. (CP 230) Southridge admitted in the trial court that no building permits were available on any of the lots in the plat until April 3,

2006. (CP 145) Even if it were county error to fail to issue building permits for the Conifer lots when it accepted building permit applications for other lots within the plat that failure is irrelevant because none of the lots within the plat were finished for the purpose of applying for building permits until 4 days after the required closing date. None of that matters, however because the county would not accept building permits for the Conifer lots until after the May 8 decision of the Hearing Examiner approving the final plat.

Southridge's argument that Pierce County erred in refusing to accept building permits on the Conifer lots within the plat when it commenced accepting building permits for the other lots within the plat is also disingenuous. The deposition of Carole Johnson put into the record by Southridge clearly explains that Southridge was able to convince the Pierce County Development/Engineering supervisor to circumvent the normal procedure followed by Pierce County for accepting building permit applications, and to accept building permit applications on some of the Southridge lots prior to the Hearing Examiner's approval of the final plat. That agreement did not extend to the Conifer lots and building permit applications could not be applied for on the Conifer lots until May 8, 2006, 39 days after the required closing date. The agreement allowing

permits to be applied for on the other lots within the plat was unique to this plat in the 19 years that Carole Johnson had been with Pierce County. (CP 226, 230, and 231) Since the agreement between Southridge and Pierce County did not allow building permits on the Conifer lots, what happened on the other lots is irrelevant to whether the Conifer lots were “finished lots” at closing. Pierce County would not accept building permit applications for any of the lots within the plat as of the March 31, 2006 closing date and it would not accept permits on the Conifer lots until May 8, 2006. Southridge did not have finished lots to sell to Conifer at closing. The failure to have the lots in a condition where building permits could be applied for was a failure of the condition that was required to occur before Conifer had the obligation to close allowing Conifer to exercise its option under paragraph 8.2 of the REPSA to terminate the Agreement and obtain from Southridge a refund of its earnest money. The court did not err in granting summary judgment.

**SOUTHRIDGE COULD NOT EXTEND THE REQUIRED
CLOSING DATE**

In the trial court Southridge argued that the Force Majeure provision of the contract allowed Southridge additional time to create

finished lots without being in breach. While it does not expressly make that argument in its opening brief it hints at the argument at page 10 where it alleged Pierce County delays, at page 14 and 15 where it blames Pierce County for delays, and in section D. of its brief at page 20 and 21. To the extent Southridge attempts to make that argument, it is without merit.

Paragraph 7.3 of the REPSA provides that the Force Majeure provision can be utilized to extend the time for Southridge to complete its obligation to record the plat and final the plat only if notice of the Force Majeure Event is given within 20 days of the Force Majeure event occurring. Section 7.3 of the Agreement states:

Notwithstanding the foregoing, if seller, despite using good faith efforts, is delayed in achieving final plat recording and completing the finished lot work due to a Force Majeure Event (as defined in section 17.5), seller may, by written notice to purchaser delivered within 20 days after the occurrence of such Force Majeure Event, extend the outside closing date by the number of days required to address such Force Majeure Event

It is not disputed that Southridge did not give the purchaser notice of a Force Majeure Event. (CP 333) Without such notice even if events occurred that would have made a Force Majeure extension available under the REPSA, as a matter of law no extension is possible. The argument that Southridge's duty to timely provide finished lots under the REPSA is

extended by the Force Majeure provision of the contract is without merit.

Even if a notice of a Force Majeure Event had been given by Southridge as required by the REPSA to make an extension possible, the REPSA is clear that the facts that are admitted to have occurred in this case do not constitute a Force Majeure Event. The express language of the Force Majeure provision of the REPSA requires both a delay in achieving final plat and a delay in completing the finished lot work to occur before the Force Majeure provision is applicable. Paragraph 7.3 of the REPSA states:

...if seller, despite using good faith efforts is delayed in achieving final plat and completing the finished lot work due to a Force Majeure Event”

The language of paragraph 7.3 is conjunctive. The plain language of the REPSA requires the both a delay in recording the plat and a delay in completing the finished lot work in order to have a Force Majeure Event. In this case Final Plat was recorded without delay due to any alleged Force Majeure Event. Since the REPSA expressly provides that two requirements must be met before the Force Majeure defense applies, the defense is inapplicable to this situation.

Third, the Force Majeure Event provision of Paragraph 7.3 does not affect the closing date mandated by paragraph 7.2 of the REPSA.

Under paragraph 7.2, closing must occur within fifteen days following the date upon which the Final Plat is recorded. The Force Majeure language of the REPSA does apply to affect the closing date once the final plat is recorded, Instead, the only date that is affected by the Force Majeure provision is the "outside closing date" which is the date by which the plat must be recorded so that closing is required to occur. The language of paragraph 7.2 is clear that once the plat is recorded closing must occur within 15 days. There is no provision in the contract for any extension of the closing date once recording occurs. Again, the language of paragraph 7.3 states:

if seller, despite using good faith efforts is delayed in achieving final plat **and** completing the finished lot work due to a Force Majeure Event (as defined in Section 17.5), Seller may, by written notice to purchaser delivered within twenty (20) days after the occurrence of such Force Majeure Event, extend the Outside Closing Date by the number of days reasonably required to address such Force Majeure Event...

The language of paragraph 7.3 only addresses the outside closing date. That date is the date by which the plat must be recorded so that closing can occur. It does not modify the requirement that closing occur within 15 days of final plat recording as is mandated by paragraph 7.2 of the REPSA. Since recording occurred on March 16, 2006 the transaction was

required to close by March 31. Since the Agreement required the lots to be finished lots by closing as defined by paragraph 17.2 the lots and to be “finished lots” as defined by the REPSA by March 31, 2006 or paragraph 8.2 of the REPSA allowed either party to terminate the contract.

The letter from Southridge dated March 13, 2006 demanding that Conifer close by March 28, 2006 was not a request to extend the closing date. Instead, it was a demand that Conifer close. (CP 129) Once the plat was recorded there no option for either party to extend the closing date under the REPSA. Southridge may not rely on the Force Majeure provision or any county delay in providing finished lots as required.

LOTS WERE NOT FINISHED BECAUSE WATER SERVICE WAS NOT AVAILABLE UNTIL MAY 30, 2006.

Southridge does not contest that paragraph 17.2 of the REPSA requires that all utilities to the lots being purchased by Conifer were required to be operational prior to closing. Indeed, paragraph 17.2 of the REPSA states in the relevant portion:

The plat improvements to be constructed by the Seller to create finished lots shall mean the following:

(i) Utilities consisting of water, gas, sanitary sewer system, underground electric power, telephone and cable TV. All such water, gas, sewer and electrical improvements

shall be operational and energized with the appropriate markers at stubbed-in locations.

It is not disputed that until a water availability letter is issued it is not possible for a water purveyor to distribute water. (CP 336) It is not disputed that a water availability letter was not issued until May, 30, 2006. (CP 18-21) It is not disputed that a water availability letter is not bondable. (CP 336) Paragraph 17.2(i) requires all utilities to be operational for the lots to be considered finished lots. At issue is the definition of "operational" as provided by the Agreement. Since the Agreement was drafted by Southridge, it will be construed against it. Wagner, supra, p. 20. Neither party alleges that the contract is ambiguous in paragraph 17.2(i). The rules of construction of a contract and the standard for granting summary judgment under a contract are set forth in Mayer v. Pierce County Medical Bureau, 80 Wn.App. 416, 90 P.2d 1323 (1995). There the court said, at page 420:

In construing a written contract, the basic principles require that (1) the intent of the parties controls; (2) the court ascertains the intent from reading the contract as a whole; and (3) the court will not read an ambiguity into a contract that is otherwise clear and unambiguous.

Interpretation of an unambiguous contract is a question of law. If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision. (Citations omitted).

In this case, the only evidence the court can look to interpret the contract is the contract itself. The parties had no negotiations about contract provisions. (CP 332) There is no other evidence to assist the court in interpreting the contract. Its interpretation is therefore a matter of law. Mayer, supra. Paragraph 17.2(i) requires utilities to be operational and energized in order for the lots to be finished lots. Conifer asserts that the plain meaning of that language is that the utilities are functioning and capable of being hooked up immediately. Since the contract was drafted by Southridge and is construed against it, as a matter of law, the contract provides that the utilities be ready for hookup at closing. It is undisputed that they were not and could not have been hooked up for service until the Certificate of Water Availability was issued on May 30, 2006, two months after closing was to occur. (CP 21, 336)

Southridge argues that the utilities such as water were bonded. The record demonstrates two things. First, it demonstrates that the bond that was in place related to water was for construction of the water system and had been released as of March 22, 2006 and there was no bond in place as of the closing date. (CP 177, 179) Second, the obligation to have a Certificate of Water Availability is not bondable. (CP 336) The lots were not finished lots as required by the contract until May 30, 2006 because,

prior to that date, no Water Availability Letter had been issued, meaning that water could not be dispensed by the water purveyor. It is difficult to understand how Southridge could argue that the water system was “operational and energized” when, although the water had been briefly turned on for testing, it had been shut off and the water purveyor could not dispense water until the Water Availability Letter was issued on May 30, 2006. The lack of operational and energized water to the site prevented the lots from being “finished lots” as defined by paragraph 17.2 of the REPSA. Since Southridge did not provide finished lots due lack of an operational and energized water system, under paragraph 8.2 of the REPSA, Conifer had the option to terminate the Agreement and obtain a refund of its earnest money. Summary judgment was appropriate.

ANTICIPATORY BREACH HAS NO APPLICATION

Southridge claims that Conifer anticipatorily breached the REPSA. At page 17 of Southridge’s opening brief it claims three acts constituted that anticipatory repudiation. Those are “verbal notice to Southridge on two separate occasions prior to March 28, 2006 and by its letter of March 28, 2006”. The sequence of events alleged by Southridge to have occurred is contained in the declarations of Scott Inveen at CP 165 and Robert

Baldwin, CP 182. At line 8 of the Inveen declaration (CP 165) and at line 5 of the Baldwin declaration (CP 182), both Conifer witness agree that the acts constituting the alleged anticipatory breach took place after the March 13, 2006 notice from Southridge demanding closing was received by Conifer. (CP 165, lines 8-10, CP 182, lines 5, 6) It is undisputed that Mr. Kelley received that notice on March 15, 2006. (CP 89) The schedule of events alleged by Southridge that occurred after that is contained in the Declaration of Robert Baldwin at CP 182. He alleges that after Mr. Kelley received the notice on March 15, Mr. Kelley called him and asked for a number of clarifications concerning the status of improvements of the lots. (CP 165, lines 8-11) He then states that “a few days” later he met with Mr. Kelley. The only statement he ascribes to Mr. Kelley meeting on that date is a statement that he felt the lot price agreed to was too high. While Mr. Baldwin in his declaration makes conclusory remarks at lines 17-20 of his declaration at CP 182, those statements are conclusory allegations that do not defeat summary judgment. Vacova Co. v. Ferrell, 62 Wn.App. 386, 814 P.2d 255 (1991). Conifer demonstrated the inadmissibility of those statements in the trial court. (CP 328) Mr. Baldwin then alleges that one day after the meeting Mr. Kelley called and said he was not going to close the lots. (CP 182, lines 20, 21).

Southridge cites one case setting forth the standard for anticipatory breach, Wallace Real Estate Investment v. Groves, 72 Wn.App. 759, 868 P.2d 149 (1994). That case was modified in the Supreme Court at 124 Wn.2d. 881 (1994). The test for anticipatory repudiation is a positive statement or action by a promissor that he will not or cannot substantially perform any of his contractual obligations. The only statement in the record meeting that test is the portion of Mr. Baldwin's declaration where he claims Mr. Kelley called and said he was not going to go forward with the closing of the lots. It is not disputed that that took place on or after March 19, after the Notice to Close had been sent at a time when Southridge could not produce finished lots. Conifer's refusal to close was an exercise of it's rights under paragraph 8.2 of the Agreement and was not an anticipatory repudiation.

Paragraph 8 of the REPSA expressly makes completion of finished lots as required by paragraph 17.2 a condition of the obligation of Conifer to close. The paragraph reads as follows, the relevant portion:

In addition to all other conditions set forth in this Agreement, the obligation of Seller, on the one hand, and Purchaser, on the other hand, to Close shall be conditioned on the following:

8.1 As of the Closing date, the other party shall have performed its obligations required to be performed by such

date under the terms of this Agreement in all material aspects and all deliveries to be made by such party at the Closing have been tendered; and

8.2 As of the Closing date, there shall exist no material breach of any of the representations and warranties made by such party under sections 14 or 15 of this Agreement...

The language of paragraph 8, specifically paragraph 8 and 8.1, make Conifer's obligation to close conditioned on Southridge having completed all of its obligations under the REPSA. That includes the obligation to provide finished lots under paragraph 17.2 of the REPSA. Conditions precedent are facts and events occurring after the making of a valid contract that must occur before there is a right of performance and before there is a breach of a contract duty. Tacoma North Park LLC v. NW LLC, 123 Wn.App. 73, 96 P.2d 454 (2004). Since Southridge did not have finished lots at the time they recorded the plat and demanded to close, the condition precedent specifically set forth in paragraph 8 of the REPSA of the obligation of Conifer to close was not satisfied, and Conifer had no obligation to close. Paragraph 8.2 specifically allowed Conifer to reject Southridge's demand to close and opt out of the contract, which is exactly what Conifer did. The paragraph states in the relevant portion:

So long as the party is not in default hereunder, if any condition to such party's obligation to proceed with the

Closing has not been satisfied or waived as of Closing date or such earlier date as provided herein, such party may, in its sole discretion, terminate its obligations under this Agreement by delivering written notice to the other party on or before such date, or such party may elect to close notwithstanding the non-satisfaction of such condition, in which event such party shall be deemed to have waived any such condition (but regardless of which election such party makes, such party shall not thereby be deemed to have waived its rights and remedies against the other party for its failure of performance or breach of its representations and warranties except as otherwise provided in this Agreement). The terms of this Section shall survive termination or closing of this Agreement.

There is no merit in an argument that Conifer's exercising its rights under the contract to terminate constitutes an anticipatory repudiation. It was an exercise of the right of Conifer to terminate the agreement upon the failure of Southridge to produce finished lots at closing.

In its opening brief to this court, Southridge argues for the first time that by exercising its option to terminate the Agreement, Conifer denied Southridge a chance to perform by providing finished lots at closing. This argument was not made at the trial court and should not be considered on appeal. (RAP 2.5) Further, there is no evidence in the record to support such a claim and Southridge does not provide any rationale how the county process approving the final plat so that building

permits could be issued would have occurred by March 31, 2006 had Conifer not exercised its right to terminate the Agreement.

In its opening brief Southridge alleges that Conifer knew that the notice to close falsely stated an inaccurate recording date for the plat. There is no evidence of that in the record and it was not argued in the trial court. It should not be considered in this appeal. (RAP 2.5)

**TRIAL COURT INTERPRETATION WAS NOT CONTRARY TO
PARTYS' INTENT**

In its opening brief at page 20, Southridge alleges that the trial court interpreted the contract contrary to the parties' intent. This is a new argument made on appeal and should not be considered in this court. (RAP 2.5) The argument also has no merit.

It is undisputed that the parties had no discussion regarding the contract provisions of the agreement drafted by Southridge. (CP 332, lines 7-10) Washington follows the objective manifestation theory of contracts. Paradiso v. Drake, 135 Wn.App. 329, 143 P.3d 859 (2006). The court can only consider what the parties wrote, giving the terms their ordinary and popular meaning. Where, as here, neither party has alleged that a contract

is ambiguous, contract interpretation is a question of law. Mayer, supra, p. 420.

Conifer argues that the partys' intent should be taken into consideration when analyzing the Agreement. Their argument fails, however, to explain any meaning of the first clause of paragraph 17.2 of the Agreement that is different than that argued by Conifer. Instead they cite the 7 month window for closing, the ability to extend the outside closing date and the ability to bond improvements and complete work after closing and argue that the contract evidences and intent to close, despite "minor interferences". Southridge's argument is difficult to follow because they never argue that any one of those provisions applies to relieve it of providing finished lots at closing. Instead, they apparently argue that the intent as expressed by the general language of the REPSA was to allow Southridge to force Conifer to close, despite their failure to provide finished lots at closing. That argument fails because paragraph 17.2 of the REPSA specifically allows Conifer to terminate the contract if the lots are not in finished lot condition prior to closing. Where contracts have general and specific language, the specific provisions control over the general ones. Parker v. Tumwater Family Practice, 118 Wn.App. 425, 76 P.3d 764 (2003). The argument that the general intent demonstrated by

the contract relieves Southridge of the obligation to provide finished lots at closing is without merit.

Southridge cites paragraph 7.2 and 7.3, indicating that the parties intended to allow Southridge to extend the outside closing date. It is not disputed that Southridge could have not recorded the plat and extended the outside closing date by which they were required to record the plat and provide finished lots had they elected to do so. They, however, cite no contract provision which allows them to extend the closing date once plat recording occurs and they admit in their opening brief at page 17 that they were required to provide finished lots within 15 days after recording of the final plat. Southridge elected when to record the plat. They chose that course rather than extending the outside closing date as they could have if they could establish that, despite good-faith efforts, the final plat had not been completed at least 10 days prior to the outside closing date as provided in REPSA paragraph 7.3. Southridge made its choice, elected to require closing to take place and then failed to meet the conditions of the contract. Nothing in the REPSA suggests that under those facts Southridge is entitled to additional time to complete the lots as finished lots once recording occurs. Southridge did not produce finished lots by the closing

date. Conifer properly exercised its right to terminate the agreement.
Summary judgment was appropriate.

ATTORNEY'S FEES

Conifer is entitled reasonable attorney's fees for defending this appeal under paragraph 26.7 of the REPSA. (CP 207) Attorney's fees should be determined on a motion pursuant to RAP 18.1 following this court's decision.

CONCLUSION

This Court should affirm the decision of the trial court granting Conifer a judgment for the \$300,000.00 it paid Southridge as earnest money together with prejudgment interest. It should also award Conifer its reasonable attorney's fees expended in this appeal.

Respectfully submitted,



Bart Adams, WSBA #11297
Attorney for Conifer

APPENDIX

REAL ESTATE PURCHASE AND SALE AGREEMENT
(PHASE -18 - SILVER CREEK)

THIS REAL ESTATE PURCHASE AND SALE AGREEMENT ("Agreement"), dated as of the Effective Date specified above the signature block for Seller below, is entered into by and between SOUTHRIDGE SILVER CREEK, LLC, a Washington limited liability company ("Seller"), and Evergreen State Builders, LLC, a Washington limited liability company ("Purchaser"). *Conifer Communities LLC (a related entity)*

1. Property. Seller is the owner of that certain real property located in Pierce County, Washington ("Permitting Jurisdiction") and commonly known as Phase 18 - Silver Creek, located on land more particularly described on the attached Exhibit A ("Property"). Seller has obtained preliminary plat approval, subject to certain conditions, under Pierce County File Nos. 367727 / 367729 / 367731, for the subdivision of a portion of the Property known as Phase 18 - Silver Creek pursuant to the site plan and layout shown in drawings referenced in attached Exhibit B ("Phase 18 - Silver Creek Preliminary Plat"), consisting of approximately one hundred fifty-five (155) lots (each, a "Lot") in the mix of 40', 50' and 60' lots for detached single family dwellings. Purchaser will purchase the Lots preliminarily identified in Exhibit B-1 attached hereto ("Lot Mix Matrix") for detached single family dwellings. The Phase 18 - Silver Creek Preliminary Plat, as it may be amended from time to time subject to the terms of this Agreement, is referred to herein as the Preliminary Plat. Purchaser wishes to purchase the Lots on the Property. The parties acknowledge and agree that Lot numbers and mix may change in which event the Purchase Price shall be adjusted as provided in Section 3 below.

2. Purchase and Sale. Seller agrees to sell the Lots identified in the Lot Mix Matrix, attached hereto as Exhibit B-1 and incorporated herein by this reference, to Purchaser, and Purchaser agrees to purchase the Lots from Seller, on the terms and conditions of this Agreement.

3. Purchase Price and Number of Lots.

Purchaser is purchasing the following number of lots and the following price per lot:

77 of the 40' Lots at ~~\$120,000~~ ^{\$123,295} per lot*
0 of the 50' Lots at \$ _____ per lot
0 of the 60' Lots at \$ _____ per lot

The total purchase price, subject to the terms of this agreement, including the provisions

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Two Four

Purchaser is purchasing the lots identified in the Lot Mix Matrix assuming that the Final Plat (defined below) for the Property results in a total of ~~seventy-seven~~ (77) Lots with the mix of Lot types described in the Lot Mix Matrix, and assuming the Purchase price per lot and the number of lots identified above, shall be ~~nine million seven hundred and forty-two thousand ~~and~~ and No/100 Dollars (\$9,742,040.00)~~. The total Purchase Price shall be reduced or increased accordingly for each Lot less or more than the ~~seventy-seven~~ (77) Lots identified above to be purchased by Purchaser which is included in the final plats recorded in the Permitting Jurisdiction's county records (each a "Final Plat") and sold to Purchaser and Coordinated Purchasers.

~~9,742,040.00~~
9,493,715

Three Hundred Thousand \$ or less dollars (Earnest Money)

4. Earnest Money. Upon execution of this Agreement, Purchaser shall deposit with Chicago Title Insurance Company's Seattle Office ("Escrow Company") ~~a~~ ~~two~~ Promissory Notes payable to Seller in the total amount of ~~Four Hundred Eighty-Seven Thousand One Hundred Two and No/100 Dollars (\$487,102.00)~~ (equal to five percent (5%) of the Purchase Price) ("Earnest Money"). The Earnest Money notes shall be substantially in the form attached as ~~Exhibit C-1 and~~ ~~Exhibit C-1~~. If Purchaser approves the Feasibility Contingency as set forth in Section 9, Purchaser shall convert the ~~First~~ Earnest Money Note attached as Exhibit C-1 equaling ~~Two Hundred Fifty Thousand and No/100 Dollars (\$250,000.00)~~ to cash and deliver such amount by wire transfer of immediately available U.S. funds to Escrow Agent within two (2) business days after such approval. The proceeds of the ~~First~~ Earnest Money Note, upon being converted to cash, shall be non-refundable except in the event of Seller's breach of its obligations hereunder. Upon receipt of the ~~Two Hundred Fifty Thousand and No/100 Dollars (\$250,000.00)~~, Escrow Agent shall promptly deliver the ~~Two Hundred Fifty Thousand and No/100 Dollars (\$250,000.00)~~ to Seller. The Earnest Money, including the Second Earnest Money Note attached as Exhibit C-2 which shall become due on the Closing Date or Purchaser's default under this Agreement, is applicable to the Purchase Price, and shall be applied to the Purchase Price at Closing, as provided in Section 7, or retained as Seller's liquidated damages in accordance with Section 21.2.

\$300,000
\$300,000

300,000

[Handwritten signature]

\$300,000

5. Conveyance of Title. At Closing, Seller shall execute and deliver to Purchaser a Statutory Warranty Deed substantially in the form attached as Exhibit D conveying fee title to the Lots, subject only to the Permitted Exceptions, as defined in Section 6 ("Deed"). Monetary encumbrances to be discharged by Seller at Closing pursuant to the terms of this Agreement shall be paid from Seller's proceeds.

6. Title Insurance.

6.1 Policy. It shall be a condition precedent to Purchaser's obligation to proceed with the Closing that Chicago Title Insurance Company ("Title Company") be committed to issue to Purchaser an ALTA Extended Coverage Owner's Policy of Title Insurance in the amount of the Purchase Price, insuring fee simple title to the Lots is vested in Purchaser, subject only to the Permitted Exceptions ("Policy").

6.2 Commitment. Purchaser has received a copy of the preliminary commitment for the Policy ("Commitment") encompassing the Property and will approve or disapprove the condition of title during the Contingency Period (as such term is defined in Section 9 below).

After the Contingency Period, if Title Company issues a supplement to the Commitment or an amended and restated Commitment (each, a "Supplemental Commitment") that contains exceptions or defects that are not Permitted Exceptions (as defined below) and were not shown on the Commitment, as previously updated, Purchaser shall deliver a Purchaser's Notice of Purchaser's approval or disapproval of the exceptions or defects shown in the Supplemental Commitment within five (5) business days after receipt of the Supplemental Commitment, but in no event later than the Closing Date. If Purchaser fails to notify Seller in writing of its disapproval of any such exceptions or defects within such 5-day period or by Closing, whichever is sooner, Purchaser shall be deemed to have accepted such exceptions or defects and they shall be Permitted Exceptions. Notwithstanding the foregoing, Purchaser may only disapprove those Supplemental Commitment exceptions or defects which would materially interfere with Purchaser's Intended Use.

6.3 Permitted Exceptions. For the purpose of this Agreement the following shall be deemed approved exceptions to title (collectively, "Permitted Exceptions"): (a) non-delinquent taxes; (b) terms and conditions of the Preliminary Plat and the Final Plats, as long as they are generally consistent with the Preliminary Plat; (c) encumbrances which are typically required for construction of plat improvements, such as, but not limited to, utility easements and right-of-way dedications, which are shown on the Preliminary Plat, to the extent such encumbrances do not materially interfere with Purchaser's ability to use, develop, permit, construct market and sell single family residences on the Lots ("Purchaser's Intended Use"), and such encumbrances are generally consistent with the Preliminary Plat; (d) Declaration of Covenants, Conditions, Restrictions, and Easements of record ("CC&Rs") including any changes to the CC&Rs Seller deems reasonably necessary to address issues and concerns raised by the Permitting Jurisdiction, the homeowner's association, the engineering drawings, and otherwise, provided that the changes do not materially adversely affect Purchaser's Intended Use; (e) rights in federal patents or state deeds; (f) building, zoning or use restrictions, regulations, or provisions general to the district; (g) general exceptions which generally appear in extended coverage title policies issued by Title Company; (h) exceptions approved by Purchaser and exceptions which Purchaser is deemed to have approved; (i) exceptions which are expressly permitted pursuant to the terms of this Agreement; and (j) all exceptions caused by or through Purchaser.

6.4 Supplemental Commitment - Disapproved Exceptions and Defects. If Purchaser timely disapproves any exception or defect in any Supplemental

Commitment, as the case may be, Seller shall, within ten (10) days after receipt of Purchaser's Notice, notify Purchaser in writing whether Seller (a) will make good faith efforts to remove such disapproved exception or defect; (b) shall be obligated to remove such disapproved exception or defect; or (c) does not intend to remove such disapproved exception or defect.

6.5 Purchaser's Response. In the event Seller (a) provides Purchaser written notice that it does not intend to remove a disapproved exception or defect or (b) fails to provide written notice within the foregoing 10-day period that it shall be obligated to remove or will make good faith efforts to remove a disapproved exception or defect (which failure shall be deemed an election not to remove such disapproved exception or defect), Purchaser shall, within five (5) business days after receipt of Seller's election or Seller's deemed election not to remove such disapproved exception or defect, whichever occurs first, deliver written notice to Seller of Purchaser's election, as its sole and exclusive remedy, to either (i) accept the disapproved exceptions or defects as Permitted Exceptions and consummate the transaction contemplated by this Agreement or (ii) terminate this Agreement, in which event the Earnest Money shall be refunded to Purchaser and Purchaser and Seller shall have no further obligations under this Agreement except for those obligations expressly surviving termination of this Agreement; provided however, if the exception or defect was first disclosed in a Supplemental Commitment Purchaser's termination right shall be limited to the Lots with respect to which Purchaser's Intended Use is materially and adversely affected by the disapproved exception or defect (which may include Lots not actually encumbered by such disapproved exception or defect), in which case neither party shall have any further obligations under this Agreement with respect to such Lots except those obligations expressly surviving termination or Closing of this Agreement. Purchaser's failure to deliver written notice within said 5 days shall be deemed an election to waive such objections and Purchaser shall purchase the Lots in with the exceptions or defects deemed to be Permitted Exceptions. If necessary to permit Purchaser 5 business days to respond, Closing shall be extended until one (1) business day after such 5 business day period or the date Seller receives Purchaser's response, whichever occurs first. If Purchaser elects to terminate this Agreement in accordance with the foregoing, Seller shall pay any cancellation fee charged by the Title Company for the Commitment.

6.6 Failure to Remove. If Seller has elected to make good faith efforts to remove a disapproved exception or defect, but despite exercising good faith efforts has been unable to remove such exception or defect on or before the scheduled Closing date, then Purchaser shall either (i) accept the disapproved exception or defect as a Permitted Exception and consummate the transaction contemplated by this Agreement or (ii) terminate this Agreement and receive a refund of the Earnest Money.

7. Closing.

7.1 Closing. For purposes of this Agreement, the term "Closing" shall mean the date of delivery and recording of the Deed from Seller to Purchaser and delivery of the applicable Purchase Price to Seller. Closing shall take place through an escrow in the offices of the Escrow Company, and Escrow Company shall open an escrow and perform the duties of escrow agent.

Out
July
7.2 Closing Date. Closing shall occur fifteen (15) days following the date on which a Final Plat for Lots in Phase 18 – Silver Creek is recorded with the Pierce County Auditor's Office, but in no event sooner than December 1, 2005 or later than ~~April~~ 30, 2006 (the "Outside Closing Date"). Minor unfinished improvements or minor repairs, replacements or corrections to improvements, shall not be grounds for Purchaser's refusal to close. On or prior to the Closing Date, the Lots being purchased by Purchaser shall be completed in accordance with Paragraph 17 below. Purchaser shall cooperate with Seller in obtaining the Final Plat.

7.3 Extension of Outside Closing Date. If Seller, despite using good faith efforts, has not completed the Final Plat Approval at least ten (10) days prior to the Outside Closing Date specified herein, then (i) Seller shall not be deemed in default hereunder, (ii) at Seller's sole option this Agreement shall terminate on the Outside Closing Date, and (iii) if terminated by Seller, the Earnest Money shall be refunded to Purchaser; provided, however, Seller may, by written notice to Purchaser delivered on or before the Outside Closing Date, extend the Outside Closing Date for up to six (6) months in order to provide additional time to achieve Final Plat Recording and complete the Finished Lot work. Notwithstanding the foregoing, if Seller, despite using good faith efforts, is delayed in achieving Final Plat Recording and completing the Finished Lot work due to a Force Majeure Event (as defined in Section 17.5), Seller may, by written notice to Purchaser delivered within twenty (20) days after the occurrence of such Force Majeure Event, extend the Outside Closing Date by the number of days reasonably required to address such Force Majeure Event up to a maximum of six months in order to provide additional time to achieve Final Plat Recording and complete the Finished Lot work ("Force Majeure Extension"). In the event of a Force Majeure Extension, the Closing shall occur within ten (10) days after Final Plat Recording and completion of Finished Lot work.

7.4 Deliveries at Closing. At Closing each party shall execute and deliver to the other or into escrow with the Escrow Company the following documents, duly executed and acknowledged, as appropriate:

7.4.1 Seller shall deliver to Purchaser or Escrow Company: (i) the Deed for the Lots included in the Closing executed and acknowledged by Seller; (ii) a non-foreign transferor certification pursuant to Section 1445 of the Internal Revenue Code; and (iii) additional documents reasonably and customarily required by Title Company in order to close and issue the Policy, including without limitation documents

evidencing the authority of the person or persons who are executing the various documents on behalf of Seller in connection with this Agreement and such affidavits or indemnities that the Title Company typically requires a Seller to execute in order to issue title insurance coverage against construction liens.

7.4.2 Purchaser shall deliver to Seller or Escrow Company: (i) the Purchase Price and other amounts payable to Seller in connection with the Closing by wire transfer; and (ii) additional documents reasonably and customarily required by Title Company in order to close, including without limitation documents evidencing the authority of the person or persons who are executing the various documents on behalf of Purchaser in connection with this Agreement.

7.4.3 Seller and Purchaser shall jointly deliver to Escrow Company: (i) a closing statement; and (ii) all transfer declarations or similar documentation required by law.

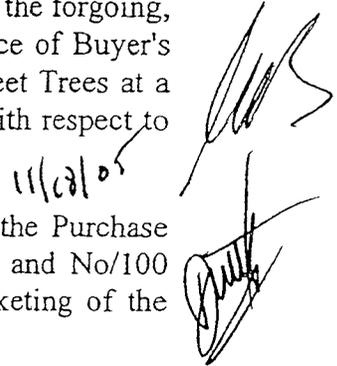
7.5 Closing Costs. Seller shall pay the cost of the Policy to the extent of owner's extended coverage, real estate excise tax, one-half the escrow fee and other customary Seller's closing costs. Purchaser shall pay the cost of any endorsements to the title policy requested by Purchaser or its lender, recording fees for recording of the Deed, one-half the escrow fee, costs incurred in connection with the transfer of any transferable permits or licenses, costs associated with Purchaser's financing, if any, transfer and use taxes arising from the transfer of any personal property and other customary Purchaser's closing costs.

7.6 Reimbursements and Credits.

7.6.1 ULID and Other Reimbursements. At Closing Purchaser shall pay Seller Four Hundred Eighty Dollars (\$480.00) per Lot as partial reimbursement for ULID-89-1 sewer facility costs. In addition, Purchaser shall pay Seller Five Thousand Dollars (\$5,000) per Lot as reimbursement for traffic mitigation costs and water charges. Except for the foregoing reimbursement amount and those fees or charges specifically identified as Purchaser's responsibility in Section 18 below, or otherwise provided for herein, Seller shall pay any and all fees, charges or impositions for mitigation, utility connections, permits and other governmental approvals arising out of or associated with development of the Silver Creek Master Planned Community ("Master Community") to the extent such development is necessary for obtaining Preliminary Plat Approval, Final Plat Approval and performing the Finished Lot work, whether payable before or after any Closing hereunder.

7.6.2 Street Trees. Seller shall be responsible for the purchase and installation of the any street trees required as part of Final Plat Approval (collectively "Street Trees"). Street Trees will be installed per the requirements of the

Final Plat and bonds. Notwithstanding anything to the contrary herein, Seller shall not be responsible for, and Buyer shall reimburse seller for any damages due to water shortages, failure to water the trees, or the negligence or willful misconduct of Buyer, Buyer's invitees, licensees, employees or subcontractors. Notwithstanding the forgoing, if Buyer and Seller are successful in obtaining Pierce County's acceptance of Buyer's bond for the Street Trees, Seller will credit Buyer for the cost of the Street Trees at a credit of \$ 175.00 per tree and Buyer shall assume all obligations with respect to the Street Trees.

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7.6.3 Marketing Reimbursement. In addition to the Purchase Price, Buyer shall pay to Seller at Closing the sum of Two Thousand and No/100 Dollars (\$2,000.00) as a non-refundable reimbursement for Seller's marketing of the Property prior to Closing.

7.6.4. Buyer's Maintenance Bond. In addition to the Purchase Price, Buyer shall pay to Seller, the sum of Five Hundred and No/100 Dollars (\$500.00) per Lot purchased by Buyer ("Buyer's Maintenance Bond"). Such amounts shall be held by Seller and applied by Seller towards the compliance with any maintenance requirements imposed as a part of the Final Plat or the Permitting Jurisdiction. Upon the final release of Seller for any maintenance bonds or requirements imposed by the Final Plat or the Permitting Jurisdiction, Seller shall return any unused portion of the Buyer's Maintenance Bond to Buyer.

7.7 Prorations. Except as otherwise provided in this Agreement, all real property taxes, assessments, membership dues, permits, licenses, utilities, surface water management charges and similar fees or charges, and other expenses due and payable in the year shall be prorated as of Closing based upon (i) the actual days of ownership of the parties for the year in which the Closing occurs utilizing the most recent ascertainable tax bills, and (ii) if the Lots have not yet been segregated as individual tax parcels, by the ratio that the total area of the Lots bears in relation to the larger tax parcels of which the Lots are a part. Seller and Purchaser agree to reprorate said real estate taxes upon Purchaser's receipt of the actual tax bill for the tax year in question, if any. Seller shall retain all rights with respect to any refund of taxes or other obligations prorated under this Section applicable to any period prior to the Closing. Except as otherwise provided in this Agreement, all other items which are customarily prorated in transactions similar to the transaction contemplated hereby and which were not otherwise dealt with, will be prorated as of the Closing. In the event any prorations, reimbursements or computations made under this Section are based on estimates or prove to be incorrect, then either party shall be entitled to an adjustment to correct the same, provided that it makes written demand on the party from whom it is entitled to such adjustment within one hundred and eighty days (180) after the end of the calendar year in which the Closing occurs. The terms of this Section shall survive termination or

Closing.

8. Condition to Parties' Obligation to Close. In addition to all other conditions set forth in this Agreement, the obligation of Seller, on the one hand, and Purchaser, on the other hand, to Close shall be conditioned upon the following:

8.1 As of the Closing date, the other party shall have performed its obligations required to be performed by such date under the terms of this Agreement in all material respects and all deliveries to be made by such party at the Closing have been tendered; and

8.2 As of the Closing date, there shall exist no material breach of any of the representations and warranties made by such party under Sections 14 or 15 this Agreement.

So long as a party is not in default hereunder, if any condition to such party's obligation to proceed with the Closing has not been satisfied or waived as of Closing date or such earlier date as provided herein, such party may, in its sole discretion, terminate its obligations under this Agreement by delivering written notice to the other party on or before such date, or such party may elect to close notwithstanding the non-satisfaction of such condition, in which event such party shall be deemed to have waived any such condition (but regardless of which election such party makes, such party shall not thereby be deemed to have waived its rights and remedies against the other party for its failure of performance or breach of its representations and warranties except as otherwise provided in this Agreement). The terms of this Section shall survive termination or Closing of this Agreement.

9. Feasibility Contingency. Purchaser's obligation to purchase the Lots in accordance with this Agreement is conditioned upon Purchaser's satisfaction, of Purchaser's Feasibility Contingency set forth below. Purchaser's notice of satisfaction of such Purchaser's Feasibility Contingency shall be given by written notice from Purchaser to Seller ("Contingency Waiver Notice") on or before fifteen (15) days after mutual acceptance of this Agreement ("Contingency Period"). If the Contingency Waiver Notice is not timely received by Seller on or before the end of the Contingency Period, Purchaser shall be deemed to have approved Purchaser's Feasibility Contingency. The parties agree that Seller will seek approval for the Final Plat in a manner substantially in accordance with the Preliminary Plat referenced in Exhibit B to this Agreement ("Approved Lot Layout"). The parties acknowledge that Final Plat Approval may not be completely achievable in accordance Preliminary Plat lot layout depending on existing title encumbrances of record, applicable laws, rules and regulations, and the preliminary plat requirements for the Preliminary Plats; Purchaser acknowledges that such changes shall not be grounds to terminate this Agreement provided that the changes do not materially adversely affect Purchaser's Intended Use

11/17/05
11/11/05 Purchaser's Feasibility Contingency is hereby
436732.01 removed subject to changes proposed by
Purchaser. SAID changes affect the existing P+S
Agreement. See Initialed Changes.

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which shall include, but not be limited to, the building footprints located on each Lot.

10. Right of Entry. Subject to the terms of this Agreement, Purchaser, its agents, contractors, employees and designees shall be entitled to enter upon the Property from the Effective Date through Closing or earlier termination of this Agreement to conduct the investigations and studies and to perform soil, engineering and other studies and investigations referred to in Section 9 and to develop plans and strategies and make other preparations regarding Purchaser's Intended Use of the Property ("Due Diligence and Planning"). Purchaser's right to conduct Due Diligence and Planning, shall be subject to the following in each such instance (i) Purchaser notifies Seller of its intent to enter the Property not less than 24 hours in advance of such entry; (ii) at Seller's election, a representative of Seller is present during any entry by Purchaser or its agents, contractors, employees and designees upon the Property, provided that it shall be Seller's responsibility to ensure that such representative is present at the time that such entry is scheduled by Purchaser; (iii) Purchaser shall take all necessary actions to insure that neither it nor any of its agents, contractors, employees and designees interfere with the development or operations occurring at the Property or neighboring properties; (iv) the Due Diligence and Planning shall be conducted at Purchaser's sole expense; (v) Purchaser shall not cause or permit any mechanic liens, materialmen's liens or other liens to be filed against the Property as a result of its Due Diligence and Planning or other activities prior to Closing; and (vi) neither Purchaser nor its agents, contractors, employees and designees shall perform any intrusive or destructive testing, including without limitation, a Phase II environmental assessment or boring, without submitting to Seller the scope and specifications for such testing and obtaining the prior written consent of Seller.

11. Restoration, Indemnification. Purchaser shall promptly restore and repair any damage caused to the Property arising from the exercise of Purchaser's rights hereunder, including without limitation damage caused by the activities of its agents, contractors, employees and designees on the Property. Purchaser shall indemnify, defend and hold Seller and its partners, members, managers, employees, officers, directors, shareholders, advisors and agents and their respective partners, members, managers, employees, officers, directors, shareholders, advisors and agents (collectively including Seller, "Indemnified Parties") harmless from and against any and all costs, claims, losses and damages, including without limitation, reasonable attorneys fees and court costs, suffered or incurred by any of the Indemnified Parties as a result of or in connection with any activities of Purchaser or Purchaser's agents, contractors, employees and designees relating to the Property, including, without limitation, materialmen's and/or mechanic's liens, damage to the Property, or injury to persons or property resulting from such activities in connection therewith, except insofar as any such claims arise from the negligence or intentional misconduct of Seller or Seller's agents, contractors, employees and designees. Purchaser's obligations under this

Section shall survive Closing or termination of this Agreement.

12. Insurance. Upon execution of this Agreement and prior to any entry onto the Property Purchaser agrees to maintain and have in effect commercial general liability insurance with (i) all risk coverage, (ii) waiver of subrogation, and (iii) limits of not less than One Million and 00/100 Dollars (\$1,000,000.00) for personal injury, including bodily injury and death, and property damage. Such insurance shall name Seller as an additional insured party. Purchaser shall, upon request from Seller from time to time, deliver to Seller a copy of the certificate of insurance effectuating the insurance required hereunder prior to the commencement of such activities which certificate shall provide that such insurance shall not be terminated without at least thirty (30) days' prior written notice to Seller.

13. Seller's Covenant to Cooperate by Providing Documents.

13.1 Within three (3) business days following the Effective Date, Seller shall provide or make available to Purchaser for inspection and copying copies of documents, if any, relating to the Property which are in Seller's possession ("Property Information"). Subsequent to Final Plat Recordings and Closing, Seller shall provide or make available to Purchaser for inspection and copying, copies of the recorded Final Plat maps and as-built drawings for the Lots. Seller agrees to make available copies of any other document related to the Property in Seller's possession which may be reasonably requested by Purchaser. For purposes of this Agreement, references to "Seller's possession" or to terms of similar import shall mean those items which are located in any of the offices of Seller located 7525 SE 24th Street, Mercer Island, Washington 98040.

13.2 Notwithstanding the foregoing, in no event shall Seller be required to make available to Purchaser any memoranda, correspondence, analyses, documents or reports prepared by or for Seller, its members, or their agents, contractors, or representatives consisting of or discussing (i) the terms of this Agreement; (ii) appraisals, assessments or other valuations related to the Property in the possession of Seller, its members or their agents; (iii) offers or inquiries from third parties relating to the purchase of the Property; (iv) organizational documents of Seller; (v) personnel records of Seller; or (vi) communications or other internal memoranda, correspondence, analyses, documents or reports that are subject to an attorney-client or other evidentiary privilege.

13.3 In the event this Agreement terminates for any reason, Purchaser shall, within ten (10) days after Seller's written request, deliver to Seller copies of all surveys, environmental audits, engineering studies, soil reports, maps, master plans, feasibility studies, and other reports and studies prepared by or for Purchaser that pertain to the Property. The foregoing sentence shall survive termination or Closing of

this Agreement.

14. Representations of Seller. Seller represents and warrants to Purchaser the following:

14.1 Non-Foreign Status and Ownership. Seller is not a foreign person as defined by the Foreign Investment in Real Property Tax Act, IRS Section 1445(b)(2), as amended.

14.2 Authority. Seller has the legal power, right and authority to enter into this Agreement and the instruments referenced herein and to consummate the transactions contemplated by this Agreement. The individuals executing this Agreement and the instruments referenced in this Agreement on behalf of Seller have the legal power, right and actual authority to bind Seller to the terms and conditions hereof and thereof.

14.3 No Conflicting Agreements. This Agreement and the consummation of the transaction evidenced by this Agreement do not violate any other agreement to which Seller is a party.

14.4 Hazardous Substances. To Seller's actual knowledge, except as may be disclosed in the documents made available to Purchaser prior to expiration of the Feasibility Contingency, there are no substances or materials defined as hazardous or toxic under any existing laws, ordinances or regulations, including without limitation petroleum and hydrocarbons ("Hazardous Substances"), in, on, or about the Lots, except in accordance with applicable laws, ordinances or regulations. To Seller's actual knowledge, except as may be disclosed in the documents made available to Purchaser prior to expiration of the Feasibility Contingency, there are no underground storage tanks in or on the Lots.

14.5 No Omission of Materials Facts or Circumstances. To Seller's actual knowledge, as of the date of this Agreement, there is no material fact or material circumstance that Seller has failed to disclose to Purchaser that would make the Property Information deceptive or misleading or the representations and warranties set forth in this Section 14 deceptive or misleading; provided, however, Seller shall have no liability for breach of the representations and warranties contained in this Section 14.5 unless Seller's failure to disclose constitutes reckless or fraudulent conduct.

14.6 Seller's Knowledge. As used in this Agreement, the terms "to Seller's knowledge" "actual knowledge" or "best of Sellers knowledge" (i) shall mean and apply to the actual knowledge of, Robert Baldwin, Andrew Miller, Scott Inveen, and Harold Kleiderman, and not to any other parties, (ii) shall mean the actual knowledge of such individuals, without any investigation or inquiry, and (iii) shall not

mean such individuals are charged with knowledge of the acts, omissions or knowledge of Seller's agents, representatives or employees. Seller represents and warrants to Purchaser that the persons named in this Section are those officers, employees, agents, contractors or representatives of Seller who are most likely to have current knowledge of the facts and circumstances which are the subject matter of the representations and warranties of Seller contained in this Agreement.

14.7 Survival of Seller Representations and Warranties. All of the representations and warranties of Seller contained in this Agreement shall be continuous and shall survive the Closing; provided that any claim for breach of Seller's representations and warranties shall be deemed waived unless Purchaser has given Seller written notice of a claim related to the same prior to the date which is one (1) year after Closing.

15. Representation of Purchaser. Purchaser represents and warrants to Seller the following:

15.1 Authority. Purchaser has the legal power, right and authority to enter into this Agreement and the instruments referenced herein and to consummate the transactions contemplated hereby. The individuals executing this Agreement and the instruments referenced herein on behalf of Purchaser have the legal power, right and actual authority to bind Purchaser to the terms and conditions hereof and thereof.

15.2 No Conflicting Agreements. This Agreement and the consummation of the transaction evidenced by this Agreement do not violate any other agreement to which Purchaser is a party.

15.3 Contractor. Purchaser is engaged in the business of construction of single family homes for commercial purposes and is a registered contractor in the State of Washington. The Lots are not being purchased for personal or individual use.

15.4 Survival of Purchaser Representations and Warranties. All of the representations and warranties of Purchaser contained in this Agreement shall be continuous and shall survive the Closing; provided that all representations and warranties shall be deemed waived unless Seller has (i) given Purchaser written notice of a claim related to the same prior to the date which is three (3) years after Closing, and (ii) filed suit within six (6) months after delivery to Purchaser of any such notice of claim.

16. Seller's Obligations With Respect to Preliminary Plat Approval and Final Plat Recording. Seller shall, at Seller's sole cost and expense, promptly proceed to make good faith efforts to complete the following: obtain all approvals for the construction of the Preliminary Plats for Phase 18 - Silver Creek obtain issuance of

approval of the Final Plat from the Permitting Jurisdiction ("Final Plat Approval"); and cause Final Plat Recording for the Lots. In obtaining Final Plat Approval, Seller shall use good faith efforts to have the Final Plat generally conform with the Preliminary Plat lot layout in terms of the mix of Lot types, configurations and locations, but the parties recognize and acknowledge that the requirements of the permitting jurisdiction may mean that the Final Plat will not precisely conform with the Preliminary Plat lot layout (e.g., the total number of Lots may be less). Seller's obligations to obtain Final Plat Approval and complete Final Plat Recording under this Section 16 shall be subject to Section 7.3, and limits Purchaser's rights and remedies for Seller's inability to perform its obligations under this Section 16.

17. Finished Lots.

17.1 Finished Lots Completion. Seller shall, at Seller's sole cost and expense, make good faith efforts to complete such Lots as Finished Lots on or before December 25, 2005, and in any event Seller shall complete such Lots as Finished Lots prior to Closing. Seller's obligations to complete the Lots as Finished Lots on or before Closing under this Section 17.1 shall be subject to Section 7.

17.2 Finished Lots Definition. As used herein, "Finished Lots" shall mean that (i) the Lots shall be in a condition that makes the Lots "complete" for the purposes of submitting a building permit and there are no restrictions preventing the issuance of building permits that are related to the Seller's obligations in the Final Plat and (ii) Seller shall have substantially completed the plat improvements identified in this Section in a good and workmanlike manner and in accordance with all conditions and requirements of the Permitting Jurisdiction; provided that where the Permitting Jurisdiction allows Seller to bond completion of an improvement, then Seller may provide such bond at the time of Final Plat Recording, complete such improvements after the Closing (in which event the Lot shall be deemed a Finished Lot notwithstanding that the improvements will be completed after the Closing). The plat improvements to be constructed by Seller to create Finished Lots shall mean the following:

(i) Utilities consisting of water, gas, sanitary sewer system, underground electric power, telephone and cable TV. All such water, gas, sewer and electrical improvements shall be operational and energized with appropriate markers at stubbed-in locations. *(Full Storm Sewer)*

(ii) For Lots entered from the street, the lots will not be level but the grade of each Lot inside the building setbacks will be within one and one-half (1 ½) foot of the grade at the back of curb at the center of the street frontage. For Lots entered from the alley, the lots will not be level but the grade of each Lot inside the building setbacks will be within one and one-half (1 ½) foot of the grade at the edge of

alley paving at the center of the alley frontage. Where the grade between adjacent lots is more than six (6) inches and less than three (3) feet, the slope of the grade change will occur on a 1:1 slope on the downhill lot.

(iii) On Lots that have been filled, there will be 95% modified proctor compaction (not including the topsoil) inside the Building Envelope, which is defined as the lot area less the setbacks. Compaction shall comply with code and other requirements or conditions of approval applicable to the Final Plat. Upon request by the Purchaser, Seller shall provide evidence with respect to 95% compaction. The evidence will be in the form of a certified Geotechnical engineer's report that includes random testing of the filled areas during the grading process. The report will address all Lots, but will not test each Lot individually. The report will include field inspection reports from said engineer with respect to the composition of such fill and filling procedures

(iv) Corners of all Lots together with all plat corners and angle points shall be staked on or before Closing. Curb plugs shall be placed in the curb.

(v) All roads shall be constructed and paved/asphalted to all municipal codes and standards; provided, that the roads may be completed with ATB, with final lift to be bonded and completed within one (1) year after Closing.

(vi) All Lots and rights of way shall be cleared of all debris at Closing.

(vii) Seller shall install street lights to the extent required by the Permitting Jurisdiction for Final Plat Approval. Seller shall install perimeter fencing to the extent required by the Permitting Jurisdiction for Final Plat Approval. CBU mailboxes shall be installed on the Lots in locations designated and approved by the U.S. Postal Service.

(viii) Seller agrees to place upon the face of the Final Plats the following easement language: "All Lots shall be subject to a non-exclusive easement 2.5 feet in width, parallel with and adjacent to all interior Lot lines and five (5) feet in width, parallel with and adjacent to all rear Lot lines for the purpose of private drainage. In the event Lot lines are adjusted after the recording of this Plat, the easements shall move with the adjusted Lot lines. Maintenance of all private drainage easements on this Plat shall be the responsibility of all Lots deriving benefit from said easements. No structures other than fences shall be constructed within these easements."

(ix) Seller shall have planted any and all other trees required for Final Plat Approval, including those required for any other common areas, open spaces or buffer tracts of the Plat.

17.3 Warranty Regarding Finished Lots. Seller agrees to pass on or transfer to Purchaser at Closing, any transferable warranties regarding the improvements on the Finished Lots. Notwithstanding the foregoing, any warranty coverage excludes: (i) damage or defect caused by Purchaser or its contractors (which term shall include subcontractors of all tiers for the purposes of this Agreement) and agents; (ii) abuse, modification, improper or insufficient maintenance, improper operation unless attributable to the acts or omissions of Seller or its contractors (which term shall include subcontractors of all tiers) and agents, and (iii) normal wear and tear.

17.4 Maintenance Bonds. If Seller posts maintenance or warranty bonds required by the Permitting Jurisdiction, Seller shall assume maintenance of and complete Final Plat improvements within the warranty period, if any, required by the terms of any maintenance bond required to be given to any governmental agency, and release of such maintenance bond shall be conclusive evidence of Seller's satisfactory performance of this condition. Seller shall further be responsible for obtaining the release of any and all such bonds obtained by Seller. If Seller posts bonds for completion of work after Closing in accordance with the terms of this Agreement, Purchaser shall grant to Seller at Closing an easement evidencing Seller's right to enter upon the applicable Lots and complete such work. The terms of this paragraph shall survive termination or Closing of this Agreement. Notwithstanding anything to the contrary herein, Buyer shall reimburse Seller for any costs or damages incurred in the event that the release of such maintenance or warranty bonds are delayed or prevented due to the negligence or willful misconduct of Buyer or Buyer's invitees, licensees, employees, or subcontractors.

17.5 Force Majeure Events. As used herein, a "Force Majeure Event" shall mean any of the following events identified by Seller in its reasonable discretion: (i) not reasonably anticipatable governmental requirements or delays, (ii) abnormally adverse weather, (iii) earthquake, fire or similar catastrophic event, (iv) acts of god, (v) unreasonably long entitlement or permit processing by Jurisdictional Authorities, or (vi) other events or circumstances beyond the reasonable control and anticipation of a party or such party's engineers, design professionals, contractors, subcontractor or agents. In no event, however, shall Force Majeure Events include a party's lack of funds or party's breach of any financial or contractual obligation.

18. Permits, Utility and Connection Fees. Seller shall pay for any and all licenses, permits, assessments, mitigation fees and impact fees and any other governmental fees or charges due and owing prior to or as a condition of recording of the Final Plat. Purchaser shall have sole responsibility to pay for any and all licenses, permits, assessments, mitigation fees, impact fees and any other governmental fees or charges, or any increases thereto, due and owing as a condition of obtaining building

permits (which were not previously paid by Seller in connection with recording the Final Plat and not specifically identified in this Agreement).

19. Purchaser's Development Obligations.

19.1 Construction Practices. Purchaser covenants that any work undertaken on or about the Lots will be performed and accomplished in a good and workmanlike manner and in accordance with all conditions and requirements of the Permitting Jurisdiction. When performing work on or about the Lots, Purchaser shall not allow dirt, debris or other excess material to accumulate on the Lots or on any other portion of the Property, including without limitation, improvements such as the storm drains, sanitary sewer systems and the streets within the Property. When performing any grading, site improvement work or construction on or about the Lots, Purchaser shall make adequate provisions to manage the surface water runoff and sedimentation in a manner required by applicable law. Purchaser shall at all times conduct the operation in such a manner as to preserve the lateral support for the adjoining properties. Purchaser shall not damage any of the improvements or personal property within the Property ("Plat Improvements"), including without limitation, public right of ways, storm drains, sanitary sewer systems, roads, curbs and grading work, and shall immediately repair any damage caused by Purchaser or Purchaser's agents, employees, contractors and designees, including without limitation damage caused by overloaded trucks crossing the Plat Improvements to access the Lots. In the event that Purchaser is in violation of the terms of this Section 19.1, as determined by Seller in Seller's sole discretion, Seller may, but is not required to, undertake any and all actions Seller deems reasonably necessary to correct such violation and invoice buyer for such cost which shall be paid within ten (10) days of invoice and thereafter bear interest at a rate of eighteen percent (18%) per annum until paid in full provided that Purchaser has received written notice of such violation at least thirty (30) days prior to Seller's election to take such action.

19.2 Covenants, Conditions and Restrictions. Purchaser acknowledges that its purchase of the Lots will be subject to the CC&Rs for the Property. Purchaser agrees that all construction, landscaping and sales must be accomplished in accordance with all of the applicable provisions of the CC&Rs.

19.3 No Protest Agreement. Except for amendments that would materially adversely affect Purchaser's Intended Use, Purchaser agrees that it shall not lodge any protest whatsoever with any governmental authority, nor otherwise interfere in any way, with respect to the development of the Planned Development District approval for Master Community ("PDD"), or any approvals for amendments to the original PDD.

19.4 Marketing. Seller shall have no obligation to provide any marketing with respect to the Lots, the Property or the Master Community. Purchaser agrees to comply with all applicable sign laws, ordinances and rules. Seller shall have the right to consent to all of Purchaser's all on-site signage for the Lots prior Closing and all off-site signage for the Lots, including off-site signage inside and outside the Master Community, provided that Seller shall not unreasonably withhold, condition or delay its consent.

19.5 Survival. The terms of this Section shall survive termination or Closing of this Agreement.

20. Notices. All notices, demands, deliveries and communications under this Agreement shall be delivered or sent by: (i) first class, registered or certified mail, postage prepaid, return receipt requested, (ii) nationally recognized overnight carrier, or (iii) facsimile (provided the original notice is also sent via a nationally recognized overnight carrier on the next business day) and shall be addressed to the address of the party set forth below with copies to the parties designated below or to such other address as either party may designate by notice pursuant to this Section. Any notice transmitted in the manner described above shall be deemed given when personally delivered, upon receipt of facsimile transmission, upon delivery by the designated carrier, or on the third (3rd) business day after mailing, whichever occurs first.

If to Seller: Southridge Silver Creek, LLC
7525 SE 24th Street, Suite 650
Mercer Island, WA 98040
Attn: Mr. Robert Baldwin
Telephone: (206) 357-4800
Fax: (206) 357-4801

With a copy to: Peterson Russell Kelly LLP
Attn: Rick Carlson
10900 NE Fourth Street
Bellevue, WA 98004
Telephone: (425) 462-4700
Facsimile: (425) 451-0714

If to Purchaser: *Conifer Homes LLC*
Evergreen State Builders, LLC
Attn: Dan Kelley
PO BOX 39573
Lakewood, WA 98439
Telephone: (253) 475-6622
Facsimile: (253) 475-6127

*(253) 381-5546
Cell #*

esblc@qwest.net

With a copy to: Campbell Dille
Attn: Bryce Dille
PO BOX 488
Puyallup, WA 98371
Telephone: (253) 848-3753
Facsimile: (253) 845-4941

21. Remedies.

21.1 Purchaser's Remedies. In the event of a material breach of this Agreement by Seller without legal excuse, Purchaser may pursue any rights or remedies available at law or equity. Notwithstanding the foregoing in no event shall Seller be liable to Purchaser for any exemplary, punitive, or consequential damages, or lost profits.

21.2 Seller's Remedies. The parties agree that in the event the Purchaser fails, without legal excuse, to complete the purchase of the Property, Seller shall keep as liquidated damages a portion of the Earnest Money pursuant to RCW 64.04.005 ~~that is does not exceed 5% of the Purchase Price~~, as the sole and exclusive remedy available to Seller for such failure (except for those obligations which expressly survive termination or Closing of this Agreement) and the unapplied Earnest Money held by Escrow Agent, shall be delivered by Escrow Company to Seller. Notwithstanding the foregoing, the forfeiture of the Earnest Money as set forth in this Section shall under no circumstances limit Seller's recovery as a result of a breach by Purchaser of any indemnifications by Purchaser or other obligations which expressly survive termination or Closing of this Agreement.

21.3 Survival of Remedies. This Section shall survive Closing or termination of this Agreement.

22. As-Is Purchase; Waiver and Release.

22.1 EXCEPT FOR THE COVENANTS, REPRESENTATIONS AND WARRANTIES OF SELLER EXPRESSLY SET FORTH IN THIS AGREEMENT OR ARISING OUT OF THE DEEDS, PURCHASER ACKNOWLEDGES AND AGREES THAT PURCHASER IS PURCHASING THE PROPERTY IN ITS "AS-IS, WHERE IS" CONDITION "WITH ALL FAULTS" AS OF THE CLOSING DATE AND SPECIFICALLY AND EXPRESSLY WITHOUT ANY WARRANTIES, REPRESENTATIONS OR GUARANTEES, EITHER EXPRESS OR IMPLIED, AS TO ITS CONDITION, FITNESS FOR ANY

PARTICULAR PURPOSE, MERCHANTABILITY, OR ANY OTHER WARRANTY OF ANY KIND, NATURE, OR TYPE WHATSOEVER FROM OR ON BEHALF OF SELLER AND WAIVES ALL CONTRARY RIGHTS AND REMEDIES AVAILABLE TO IT UNDER WASHINGTON AND FEDERAL LAW. EXCEPT AS MAY OTHERWISE BE EXPRESSLY PROVIDED HEREIN, SELLER HAS MADE NO AGREEMENT TO ALTER, REPAIR OR IMPROVE ANY OF THE PROPERTY.

22.2 EXCEPT FOR THE COVENANTS, REPRESENTATIONS AND WARRANTIES OF SELLER EXPRESSLY SET FORTH IN THIS AGREEMENT OR ARISING OUT OF THE DEEDS, SELLER SPECIFICALLY DISCLAIMS ANY WARRANTY, GUARANTY OR REPRESENTATION, ORAL OR WRITTEN, PAST OR PRESENT, EXPRESS OR IMPLIED, CONCERNING THE PROPERTY, INCLUDING WITHOUT LIMITATION: (A) THE VALUE, NATURE, QUALITY OR CONDITION OF THE PROPERTY, INCLUDING THE WATER, STRUCTURAL INTEGRITY, SOIL AND GEOLOGY; (B) THE SUITABILITY OF THE PROPERTY FOR ANY FUTURE DEVELOPMENT; (C) THE COMPLIANCE OF OR BY THE PROPERTY WITH ANY LAWS, RULES, ORDINANCES OR REGULATIONS OF ANY APPLICABLE GOVERNMENTAL AUTHORITY OR BODY OR ANY COVENANTS, CONDITIONS AND RESTRICTIONS; (D) THE HABITABILITY, MERCHANTABILITY, MARKETABILITY, PROFITABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE PROPERTY; (E) THE MANNER OR QUALITY OF THE CONSTRUCTION OR MATERIALS, IF ANY, INCORPORATED INTO THE PROPERTY; (F) THE PRESENCE OR ABSENCE OF HAZARDOUS MATERIALS AT, ON, UNDER, OR ADJACENT TO THE PROPERTY OR ANY OTHER ENVIRONMENTAL MATTER OR CONDITION OF THE PROPERTY.

22.3 EXCEPT FOR THE COVENANTS, REPRESENTATIONS AND WARRANTIES OF SELLER EXPRESSLY SET FORTH IN THIS AGREEMENT OR ARISING OUT OF THE DEEDS, ANY INFORMATION PROVIDED BY OR ON BEHALF OF SELLER WITH RESPECT TO THE PROPERTY WAS OBTAINED FROM A VARIETY OF SOURCES AND SELLER HAS NOT MADE ANY INDEPENDENT INVESTIGATION OR VERIFICATION OF SUCH INFORMATION AND MAKES NO REPRESENTATIONS AS TO THE ACCURACY OR COMPLETENESS OF SUCH INFORMATION. SELLER IS NOT LIABLE OR BOUND IN ANY MANNER BY ANY ORAL OR WRITTEN STATEMENTS, REPRESENTATIONS OR INFORMATION PERTAINING TO THE PROPERTY FURNISHED BY SELLER OR ANY REAL ESTATE BROKER, AGENT, EMPLOYEE, SERVANT OR OTHER PERSON OR OTHERWISE MADE AVAILABLE TO PURCHASER EXCEPT FOR THE EXPRESS COVENANTS, REPRESENTATIONS AND WARRANTIES SET FORTH IN THIS AGREEMENT OR ARISING UNDER THE DEEDS.

22.4 PURCHASER REPRESENTS AND AGREES THAT PURCHASER IS A SOPHISTICATED AND EXPERIENCED PURCHASER OF PROPERTIES SUCH AS THE PROPERTY AND HAS BEEN DULY REPRESENTED BY COUNSEL, OR HAS BEEN GIVEN THE OPPORTUNITY TO CONSULT WITH COUNSEL, IN CONNECTION WITH THE NEGOTIATION OF THIS AGREEMENT. PURCHASER ACKNOWLEDGES THAT SELLER HAS ONLY OWNED THE PROPERTY FOR A SHORT PERIOD OF TIME.

22.5 IN RECOGNITION OF THE OPPORTUNITY AFFORDED TO PURCHASER PURSUANT TO THIS AGREEMENT TO INVESTIGATE ANY AND ALL ASPECTS OF THE PROPERTY AS PURCHASER DETERMINES TO BE APPROPRIATE, PURCHASER, FOR ITSELF AND ITS AFFILIATES, SUBSIDIARIES, OFFICERS, DIRECTORS, MEMBERS, MANAGERS, SHAREHOLDERS, TRUSTEES, PARTNERS, AGENTS, EMPLOYEES, SUCCESSORS, AND ASSIGNS, AND EACH OF THEM, BOTH PRESENT AND PAST, AGREES THAT THEY WILL BE DEEMED UPON COMPLETION OF CLOSING TO, AT THAT TIME, RELEASE, DISCHARGE AND ACQUIT SELLER AND THE INDEMNIFIED PARTIES OF AND FROM ANY AND ALL CLAIMS, DEMANDS, OBLIGATIONS, LIABILITIES, INDEBTEDNESS, BREACHES OF CONTRACT, BREACHES OF DUTY OR ANY RELATIONSHIP, ACTS, OMISSIONS, MISFEASANCE, MALFEASANCE, CAUSES OF ACTION, DEBTS, SUMS OF MONEY, ACCOUNTS, COMPENSATIONS, CONTRACTS, CONTROVERSIES, PROMISES, DAMAGES, COSTS, LOSSES AND EXPENSES, OF EVERY TYPE, KIND, NATURE, DESCRIPTION OR CHARACTER (COLLECTIVELY, "CLAIMS"), WHETHER IN TORT OR CONTRACT, ARISING OUT OF OR RELATING TO THE PHYSICAL, ECONOMIC OR LEGAL CONDITION OR ANY OTHER ASPECT OR CONDITION OF THE LOTS INCLUDED IN THE CLOSING, AND IRRESPECTIVE OF HOW, WHY OR BY REASON OF WHAT FACTS, WHETHER HERETOFORE, NOW EXISTING OR HEREAFTER ARISING, OR WHICH COULD, MIGHT OR MAY BE CLAIMED TO EXIST, OF WHATEVER KIND OR NAME, WHETHER KNOWN OR UNKNOWN, SUSPECTED OR UNSUSPECTED, LIQUIDATED OR UNLIQUIDATED, OTHER THAN (I) CLAIMS BASED UPON OR ARISING FROM REPRESENTATIONS, WARRANTIES OR COVENANTS OF SELLER SET FORTH IN THIS AGREEMENT OR ARISING OUT OF THE DEEDS AND (II) CLAIMS ARISING UNDER ANY LAW, REGULATION OR ORDINANCE RELATED TO HAZARDOUS SUBSTANCES. PURCHASER HEREBY ACKNOWLEDGES AND AGREES THAT FACTUAL MATTERS NOW UNKNOWN TO IT MAY HAVE GIVEN OR MAY HEREAFTER GIVE RISE TO CLAIMS WHICH ARE PRESENTLY UNKNOWN, UNANTICIPATED AND UNSUSPECTED, AND IT FURTHER ACKNOWLEDGES AND AGREES THAT THIS AGREEMENT HAS

BEEN NEGOTIATED AND AGREED UPON IN LIGHT OF THAT REALIZATION AND THAT IT NEVERTHELESS HEREBY INTENDS TO RELEASE, DISCHARGE AND ACQUIT SELLER FROM ANY SUCH UNKNOWN CLAIMS AT THE APPLICABLE CLOSING TO THE EXTENT PROVIDED HEREIN.

22.6 NOTHING IN THIS SECTION 22 SHALL BE CONSTRUED TO REQUIRE PURCHASER TO INDEMNIFY, DEFEND OR HOLD HARMLESS SELLER FROM AND AGAINST ANY CLAIMS BROUGHT BY THIRD PARTIES.

22.7 This Section shall survive termination or Closing of this Agreement.

23. Broker Disclosure; Commissions, Finder's Fees, and/or Monetary Compensation. The parties warrant that they have not dealt with any real estate licensees or finders with respect to this transaction and the Property and that there are no real estate commissions owing. If Buyer or Seller has dealt with any such person with respect to the sale of this Property, each party shall be solely responsible for the payment of any sum due such person or firm with whom the respective party has dealt and that party shall indemnify and hold the other party harmless from any liability in respect thereto, including attorney's fees and costs incurred by the other party.

24. Cooperation. Purchaser shall cooperate with Seller in making applications and other submissions required under the terms of this Agreement, including without limitation, applications for preliminary and final plat approvals and submissions for bonds, and Purchaser shall promptly execute such documents as are necessary for such applications and submissions as long as any such cooperation does not require Purchaser to incur any costs, expenses or liabilities Purchaser would not otherwise be obligated to pay pursuant to this Agreement and would not otherwise have a material and adverse effect on Purchaser's Intended Use. This Section shall survive termination or Closing of this Agreement.

25. Seller's Right to Participate in Assignment /Sales. In addition to any other rights given under this Agreement, for (i) six (6) months after the Closing Date, or (ii) at any time while Seller retains ownership of any of the Lots within the Property, whichever occurs later, in the event of any offer or negotiation by Purchaser to sell a Lot or Lots to another builder or to sell any portion of the Property without Purchaser constructing a home on each Lot thereon, Seller retains the right to approve of such sale which consent shall not be unreasonably withheld. In addition, in the event that Seller approves of such sale or transfer, Seller shall receive twenty-five percent (25%) of the gross profits from the sale of the Lots by Buyer.

26. General Provisions.

26.1 Venue. Venue for any action arising out of this Agreement shall be in the county in which the Property is located.

26.2 Waiver of Trial by Jury. Seller and Purchaser, to the extent they may legally do so, hereby expressly waive any right to trial by jury of any claim, demand, action, cause of action, or proceeding arising under or with respect to this Agreement, or in any way connected with, or related to, or incidental to, the dealings of the parties hereto with respect to this Agreement or the transactions related hereto or thereto, in each case whether now existing or hereafter arising, and irrespective of whether sounding in contract, tort, or otherwise. To the extent they may legally do so, Seller and Purchaser hereby agree that any such claim, demand, action, cause of action, or proceeding shall be decided by a court trial without a jury and that any party hereto may file an original counterpart or a copy of this Section with any court as written evidence of the consent of the other party or parties hereto to waiver of its or their right to trial by jury.

26.3 Captions. The captions contained in this Agreement are inserted only as a matter of convenience and in no way define, limit, extend or describe the scope of this Agreement or the intent of any provision contained in it.

26.4 Severability. If any part of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions shall remain in full force and effect, and shall in no way be affected, impaired or invalidated.

26.5 Assignment. Except as provided below, Purchaser shall not assign or otherwise transfer this Agreement or any interest herein without Seller's prior written consent.

(i) If Purchaser disagrees with Seller's decision to deny approval, Purchaser's sole remedy shall be to seek injunctive relief. No assignment hereunder, whether consented to or not, shall be deemed to relieve Purchaser from any liability or obligation under this Agreement and Purchaser and assignee shall remain jointly and severally liable for all of Purchaser's liabilities and obligations under this Agreement. Any assignee shall be deemed to have made all representations and warranties made by Purchaser hereunder, as if the assignee were the original signatory hereto. The giving of consent to any assignment hereunder shall not release Purchaser from obtaining consent to any other assignment hereunder.

(ii) Notwithstanding anything to the contrary herein, in the event that Purchaser is attempting to assign some or all of its rights to purchase the Lots under the terms of this Agreement, in addition to Seller's right to approve or disapprove of such assignment, Seller may, in Seller's sole discretion, elect to terminate this Agreement

between Seller and Purchaser with respect to the Lot(s) in question and sell the such Lot(s) to such third party on the same terms and conditions as stated in the proposed assignment agreement; in the event of a partial assignment of rights under this Agreement, Purchaser shall still be bound to purchase the balance of the Lots.

26.6 Binding Effect. Subject to the foregoing limitations on assignment, this Agreement shall inure to the benefit of and be binding on the heirs, executors, administrators, personal representatives, successors and assigns of both Purchaser and Seller.

26.7 Attorneys' Fees. If an action or proceeding occurs between the parties seeking interpretation or enforcement of any provision contained in this Agreement, or in connection with any arbitration or mediation of any dispute, the prevailing party in any such action or proceeding shall be entitled to reasonable attorneys' fees and costs (including such costs and fees as are incurred in any trial, on any appeal, in any bankruptcy proceeding) and in any petition for review in addition to any other relief which a court of law having jurisdiction determines it is entitled to.

26.8 Time. Time is of the essence of this Agreement.

26.9 Recordation. Buyer shall not, without the prior written consent of Seller, which may be withheld or granted in Seller's sole discretion, record this Agreement, or any Memorandum referencing Buyer's rights under this Agreement.

26.10 Entire Agreement; Amendment. This is the entire agreement of the parties with respect to the Property and supersedes all written or oral agreements or understandings. This Agreement may be modified only in writing signed by both parties.

26.11 Governing Law. This Agreement shall be construed according to the internal laws of the State of Washington, without regard to conflict of laws principles.

26.12 Date of Performance. If the date for any performance under this Agreement falls on a weekend or holiday, the time shall be extended to the next business day.

26.13 Eminent Domain. If any of the Lots are taken in eminent domain proceedings prior to Closing, Purchaser may terminate this Agreement with respect to those Lots for which Purchaser's Intended Use is materially and adversely affected by the taking (which may include Lots not actually taken by such disapproved exception or defect). Purchaser must exercise the foregoing election to terminate with respect to affected Lots by written notice to Seller on or before the earlier of (i) twenty (20) days

after such taking or (ii) two (2) business days prior to Closing, in which case neither party shall have any further obligations under this Agreement with respect to such Lots except those obligations expressly surviving termination or Closing of this Agreement. If Purchaser does not elect to terminate or if the taking does not materially and adversely affect Purchaser's Intended Use, then the Closing shall take place as herein provided without abatement of the Purchase Price, and Seller shall deliver or assign to Purchaser at the Closing, without warranty or recourse, all of Seller's right, title and interest in and to all condemnation awards paid or payable to Seller.

26.14 Governmental Approval. Prior to Closing, Purchaser shall not, except with Seller's prior written consent, which shall not be unreasonably withheld, conditioned or delayed: (i) apply for a zoning change, variance, subdivision maps, lot line adjustment, or other discretionary governmental act, approval or permit or (ii) submit any reports, studies or other documents, including, without limitation, plans and specifications, impact statements for water, sewage, drainage or traffic, environmental review forms, or energy conservation checklists to any governmental agency, or any amendment or modification to any such instruments or documents. Except as expressly provided herein, Purchaser's obligation to purchase the Lots shall not be subject to or conditioned upon Purchaser's obtaining any variances, zoning amendments, subdivision maps, lot line adjustment or other discretionary governmental act approval or permit.

26.15 Beneficiaries; No Joint Venture. This Agreement is for the benefit of Purchaser and Seller, and except for Indemnified Parties, no other person or entity will be entitled to rely on this Agreement, receive any benefit from it or enforce any provisions of it against Purchaser or Seller. Neither this Agreement nor anything contained in this Agreement shall create, or be deemed to create, a partnership, joint venture or other joint or equity type agreement between Purchaser and Seller.

26.16 Waiver. No covenant, term or condition of this Agreement other than as expressly set forth herein shall be deemed to have been waived by Seller or Purchaser unless such waiver is in writing and executed by Seller or Purchaser, as the case may be.

26.17 Exhibits. The following attached Exhibits are incorporated into and made a part of this Agreement:

Exhibit A	Legal Description of the Property
Exhibit B	Preliminary Plat of Phase 18 – Silver Creek
Exhibit B-1	Lot Mix Matrix
Exhibit C-1	Earnest Money Note
Exhibit C-2	Second Earnest Money Note
Exhibit D	Deed

26.18 Counterparts; Facsimile. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute the same agreement, whether or not all parties execute each counterpart. Signatures transmitted by facsimile shall have the same effect as original ink signatures.

26.19 Acceptance. This offer is made subject to acceptance by Seller on or before 5:00 P.M. on that date which is two (2) days after receipt of a signed original from Purchaser ("Acceptance Date"). Seller shall be deemed to have accepted all of the terms and conditions of this Agreement and to be bound by its terms and conditions at such time that it executes the signature space provided below. If such acceptance is not acknowledged below by Seller's execution of this Agreement on or before the Acceptance Date, this Agreement shall be immediately deemed null and void and all rights and obligations arising from it shall be terminated and of no further force and effect whatsoever.

11/18/05

AGREED AND ACCEPTED THIS 28 DAY OF Oct, 2005.

PURCHASER: Evergreen State Builders, LLC, a Washington limited liability company *Comifer Homes LLC*

By: *Daniel M. Kelley*
Name: DANIEL M. KELLEY
Title: MANAGER

AGREED AND ACCEPTED THIS 1 DAY OF November, 2005 ("Effective Date").

SELLER: SOUTHRIDGE SILVER CREEK, LLC, a Washington limited liability company

By: *Robert Baldwin*
Name: ROBERT BALDWIN
Title: General Manager

EXHIBIT A
TO
REAL ESTATE PURCHASE AND SALE AGREEMENT
(PHASE 18 - SILVER CREEK)

LEGAL DESCRIPTION OF REAL PROPERTY

EXHIBIT B
TO
REAL ESTATE PURCHASE AND SALE AGREEMENT
(PHASE 18 – SILVER CREEK)

PRELIMINARY PLAT OF PHASE 18 – SILVER CREEK

Preliminary Plat of Phase 18 – Silver Creek Map by Apex Engineering PLLC File No.
_____ dated _____ and revised _____.

SR 028

EXHIBIT B-1
TO
REAL ESTATE PURCHASE AND SALE AGREEMENT
(PHASE 18 – SILVER CREEK)

LOT MIX MATRIX

Silver Creek Phase 18 – Silver Creek - Lot Mix Summary				
40 Foot Lots	50 Foot Lots	60 Foot Lots		Summary
37	19	1		77 - 40 Foot
38	20	2		36 - 50 Foot
39	21	3		42 - 60 Foot
40	22	4		155 TOTAL
41	23	5		
42	24	6		
43	25	7		
44	26	8		
45	27	9		
46	28	10		
47	29	11		
48	30	12		
49	31	13		
50	32	14		
51	33	15		
52	34	16		
53	35	17		
54	36	18		
55	114	124		
56	115	125		
57	116	126		
58	117	127		
59	118	128		
60	119	129		
61	120	130		
62	121	131		
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64	123	133		
65	148	134		
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EXHIBIT C-1
TO
REAL ESTATE PURCHASE AND SALE AGREEMENT
(PHASE 18 - SILVER CREEK)

FORM OF ~~REAL~~ EARNEST MONEY PROMISSORY NOTE

~~\$ 250,000.00~~ \$ 300,000.00

~~Evergreen State Builders~~ *Latwood*, Washington
~~October 28~~ *Nov 17*, 2005
Compartments LLC

FOR VALUE RECEIVED, the undersigned, ~~Evergreen State Builders~~, LLC, a Washington limited liability company ("Purchaser"), does hereby promise to pay to the order of **SOUTHRIDGE SILVER CREEK, LLC**, a Washington limited liability company ("Seller") the sum of ~~Two Hundred Fifty Thousand and No/100 Dollars~~ *Three* Hundred ~~Fifty~~ Thousand and No/100 Dollars ~~(\$250,000.00)~~ *\$ 300,000.00*, in lawful money of the United States of America, upon approval of the Feasibility Contingency, as defined in the Purchase and Sale Agreement between Purchaser and Seller dated October ~~28~~, 2005 ("Purchase Agreement").

[Handwritten signature]
[Handwritten signature]
11/17/05

Purchaser's failure to pay the earnest money in accordance with the terms of this Note shall constitute default on said Purchase Agreement as well as on this Note. Upon Purchaser's default under the Purchase Agreement or this Note, including the failure to pay this Note when due, and without notice or demand, all amounts owed under this Note, including all accrued but unpaid interest, shall thereafter bear interest at twelve percent (12%) per year.

No failure or delay by Seller in exercising Seller's rights under this Note shall be a waiver of such rights. Every person or entity at any time liable for the payment of the indebtedness evidenced hereby waives presentment for payment, demand, and notice of nonpayment of this Note.

Time is of the essence under this Note and in the performance of every term, covenant and obligation contained herein.

This Note shall be construed according to the internal laws of the State of Washington, without regard to conflict of laws principles.

If an action or proceeding occurs between the parties seeking interpretation or enforcement of any provision contained in this Note, or in connection with any arbitration or mediation of any dispute, the prevailing party in any such action or proceeding shall be entitled to reasonable attorneys' fees and costs (including such costs and fees as are incurred in any trial, on any appeal, in any bankruptcy proceeding) and in any petition for review in addition to any other relief which a court of law having jurisdiction determines it is entitled to.

SR 031

ORAL AGREEMENTS OR ORAL COMMITMENTS TO LOAN MONEY, TO
EXTEND CREDIT, OR TO FOREBEAR FROM ENFORCING REPAYMENT OF A
DEBT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW.

PURCHASER:

Conifer Homes LLC
~~Evergreen State Builders, LLC,~~
a Washington limited liability company

By: *Paul Kelley*
Name: _____
Title: *Manager*

Void
[Signature]
[Signature]

EXHIBIT C-2
TO
REAL ESTATE PURCHASE AND SALE AGREEMENT
(PHASE 18 - SILVER CREEK)

FORM OF SECOND EARNEST MONEY PROMISSORY NOTE

\$ 237,102.00

[Signature], Washington
October 28, 2005

FOR VALUE RECEIVED, the undersigned, **Evergreen State Builders, LLC**, a Washington limited liability company ("Purchaser"), does hereby promise to pay to the order of **SOUTHRIDGE SILVER CREEK, LLC**, a Washington limited liability company ("Seller") the sum of Two Hundred Thirty-Seven Thousand One Hundred Two and No/100 Dollars (\$237,102.00), in lawful money of the United States of America, upon approval of the Feasibility Contingency, as defined in the Purchase and Sale Agreement between Purchaser and Seller dated October 28, 2005 ("Purchase Agreement").

Purchaser's failure to pay the earnest money in accordance with the terms of this Note shall constitute default on said Purchase Agreement as well as on this Note. Upon Purchaser's default under the Purchase Agreement or this Note, including the failure to pay this Note when due, and without notice or demand, all amounts owed under this Note, including all accrued but unpaid interest, shall thereafter bear interest at twelve percent (12%) per year.

No failure or delay by Seller in exercising Seller's rights under this Note shall be a waiver of such rights. Every person or entity at any time liable for the payment of the indebtedness evidenced hereby waives presentment for payment, demand, and notice of nonpayment of this Note.

Time is of the essence under this Note and in the performance of every term, covenant and obligation contained herein.

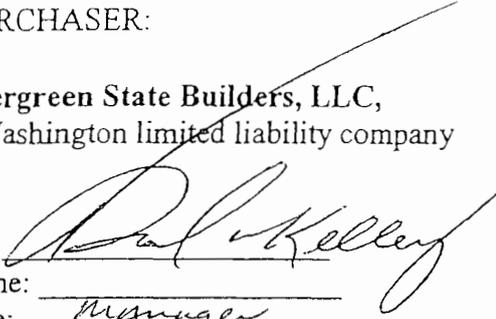
This Note shall be construed according to the internal laws of the State of Washington, without regard to conflict of laws principles.

If an action or proceeding occurs between the parties seeking interpretation or enforcement of any provision contained in this Note, or in connection with any arbitration or mediation of any dispute, the prevailing party in any such action or proceeding shall be entitled to reasonable attorneys' fees and costs (including such costs and fees as are incurred in any trial, on any appeal, in any bankruptcy proceeding) and in any petition for review in addition to any other relief which a court of law having jurisdiction determines it is entitled to.

ORAL AGREEMENTS OR ORAL COMMITMENTS TO LOAN MONEY, TO
EXTEND CREDIT, OR TO FOREBEAR FROM ENFORCING REPAYMENT OF A
DEBT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW.

PURCHASER:

Evergreen State Builders, LLC,
a Washington limited liability company

By: 

Name: _____

Title: Manager

**EXHIBIT D
TO
REAL ESTATE PURCHASE AND SALE AGREEMENT
(PHASE 3 - SOUTHRIDGE)**

FORM OF DEED

AFTER RECORDING RETURN TO:

STATUTORY WARRANTY DEED

Reference Number of Related Document: N/A
Grantor(s): _____
Grantee(s): _____
Abbreviated Legal Description: _____
Additional Legal Description: Exhibit A of Document
Assessor's Property Tax Parcel No.: _____

THE GRANTOR, _____, a Washington limited liability company, for and in consideration of Ten Dollars (\$10.00), in hand paid, conveys and warrants to _____, a Washington corporation (the "Grantee"), the real estate situated in Pierce County, Washington, more particularly described on Attachment 1 attached hereto, SUBJECT TO all liens, charges, encumbrances and matters described on Attachment 2 attached hereto.

SR 035

D-1

DATED this ____ day of _____, 20 ____.

GRANTOR:

a Washington limited liability company

By: _____

Name: _____

Title: _____

[Insert notary block.]

EXHIBIT 1 - LEGAL DESCRIPTION [Attach legal description for applicable Lots.]

EXHIBIT 2 - LIST OF PERMITTED EXCEPTIONS [Attach Permitted Exceptions for applicable Lots.]

SR 036

RECEIVED

SEP 25 2007

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

NO. 36391-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SOUTHRIDGE SILVER CREEK, LLC
and JOHN DOES and JANE DOES 1 through 10,
Appellants

v.

EVERGREEN STATE BUILDERS LLC,
And CONIFER HOMES, LLC
Respondents

CERTIFICATE OF SERVICE OF BRIEF OF RESPONDENT CONIFER
HOMES

Bart L. Adams, WSBA 11297
Attorney for Respondents

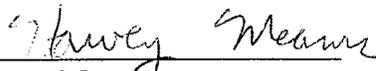
Adams & Adams
2626 N. Pearl
Tacoma, WA 98407
(253) 761-0141

I certify that on the 25th day of September, 2007, I caused a true and correct copy of the Brief of Respondent Conifer Homes and this Certificate of Service to be served on the following by placing said document in a sealed envelope, via first class U.S. Postal Service with correct postage affixed addresses to:

Michael Callan and Courtney Williams
1850 Skyline Tower, 10900 NE 4th Street
Bellevue, WA 98004

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated September 25, 2007 at Tacoma, Washington



Harvey Means

NO. 36391-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SOUTHRIDGE SILVER CREEK, LLC
and JOHN DOES and JANE DOES 1 through 10,
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v.

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CERTIFICATE OF SERVICE OF BRIEF OF RESPONDENT CONIFER
HOMES

Bart L. Adams, WSBA 11297
Attorney for Respondents

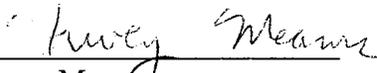
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Harvey Means