

FILED
COURT OF APPEALS
DIVISION II

No. 36609-6-II

08 JAN 11 PM 4:45

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON
STATE OF WASHINGTON
DEPUTY CLERK

GEONERCO, INC. and/or assigns, n/k/a RIVERSIDE HOMES, INC., an
Oregon corporation d/b/a Riverside Homes Vancouver,

Respondent,

v.

GRAND RIDGE PROPERTIES IV LLC,
an Oregon limited liability company,

Appellant.

BRIEF OF RESPONDENT

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP
Attorneys for Respondent

BRADLEY A. MAXA
WSBA No. 15198

1201 Pacific Avenue, Suite 2100
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION1

II. STATEMENT OF CASE3

III. ARGUMENT.....10

 A. LEGAL BACKGROUND10

 1. Statue of Frauds10

 2. Purchase and Sale Agreements12

 3. Finished Lot Agreements14

 B. PARAGRAPH 1 OF THE PSA SATISFIED THE
 STATUTE OF FRAUDS BY AUTHORIZING A
 THIRD PERSON TO INSERT THE CORRECT
 LEGAL DESCRIPTION BEFORE CLOSING.....16

 1. The Parties Did Satisfy the Statute of Frauds by
 Authorizing Escrow to Add the Correct Property
 Description.....16

 2. Grand Ridge's Arguments Do Not Prevent
 Application of *Nishikawa* in this Case.....18

 3. Because the PSA Authorized the Escrow Agent to
 Insert the Correct Legal Description, All of Grand
 Ridge's Other Arguments Are Immaterial.24

 C. ADDENDUM 1 SATISFIED THE STATUTE OF
 FRAUDS BECAUSE IT REFERENCED ANOTHER
 DOCUMENT THAT CONTAINED A LEGAL
 DESCRIPTION OF THE PROPERTY.24

 1. The Parties Complied with the Statute of Frauds by
 Reference to the Commitment For Title Insurance,
 Which Contained a Correct Legal Description.24

2. The Fact that the Parties Mistakenly Failed to Attach the Correct Legal Description Contained in the Title Policy is Immaterial.....26

3. Grand Ridge Conceded in the Trial Court that Reference to a Complete Legal Description in a Purchase and Sale Agreement Satisfies the Statute of Frauds.28

4. The *Berg* Case is Inapplicable Because Addendum 1 Referred to an Existing Document.....29

5. The *Howell* Case is Inapplicable Because the PSA Did Specify the Portion of Grand Ridge's Property to Be Conveyed.....31

D. A PURCHASE AND SALE AGREEMENT FOR THE SALE OF LOTS TO BE CREATED IN THE FUTURE IS NOT INVALID.33

E. NO BASIS EXISTS FOR GRAND RIDGE'S ARGUMENT THAT THE AGREEMENT IS VOID BECAUSE THERE IS NO MEETING OF THE MINDS.....38

F. RIVERSIDE IS ENTITLED TO RECOVER ITS ATTORNEY FEES IN THE TRIAL COURT AND IN THIS COURT UNDER THE ATTORNEY FEE PROVISION IN THE PSA.....40

IV. CONCLUSION.....40

TABLE OF AUTHORITIES

Cases

<i>Berg v. Ting</i> , 125 Wn.2d 544, 886 P.2d 564 (1995).....	21, 25, 29-31
<i>Bigelow v. Mood</i> , 56 Wn.2d 340, 351 P.2d 429 (1960).....	25
<i>Dice v. City of Montesano</i> , 131 Wn. App. 675, 128 P.3d 1253 (2006).....	20
<i>Dickson v. Kates</i> , 130 Wn. App. 724, 133 P.3d 498 (2006).....	25
<i>Dunbabin v. Allen Realty Co.</i> , 26 Wn. App. 660, 613 P.2d 570 (1980).....	11
<i>Ecolite Manufacturing Co. v. R.A. Hanson Co.</i> , 43 Wn. App. 267.....	32
<i>Edwards v. Meader</i> , 34 Wn.2d 921, 210 P.2d 1019 (1949).....	16
<i>Firth v. Lu</i> , 146 Wn.2d 608, 49 P.3d 1117 (2002).....	11
<i>Garrett v. Shriners Hospitals for Crippled Children</i> , 13 Wn. App. 77, 533 P.2d 144 (1975).....	32
<i>Howell v. Inland Empire Paper Co.</i> , 28 Wn. App. 494, 624 P.2d 739 (1981).....	31
<i>Key Design, Inc. v. Moser</i> , 138 Wn.2d 875, 983 P.2d 653 (1999).....	10-11
<i>Knight v. American National Bank</i> , 52 Wn. App. 1, 756 P.2d 757 (1988).....	26-27
<i>Martin v. Seigel</i> , 35 Wn.2d 223, 212 P.2d 107 (1949).....	11
<i>Martinsen v. Cruikshank</i> , 3 Wn.2d 565, 101 P.2d 604 (1940).....	10
<i>Nelson v. Great Northwest Federal Savings & Loan Assoc.</i> , 37 Wn. App. 316 679 P.2d 953 (1984).....	13

<i>Nishikawa v. U.S. Eagle High, LLC</i> , 138 Wn. App. 841, 158 P.3d 1265 (2007).....	16-18, 21-22
<i>Noah v. Montford</i> , 77 Wn.2d 459	16
<i>Plein v. Lackey</i> , 149 Wn.2d 214, 67 P.3d 1061 (2003)	28
<i>Rigby v. State</i> , 49 Wn.2d 707, 306 P.2d 216 (1957).....	13
<i>Tenco, Inc. v. Manning</i> , 59 Wn.2d 479, 368 P.2d 372 (1962).....	28
<i>Western Farm Service, Inc. v. Olsen</i> , 114 Wn. App. 508, 59 P.3d 93 (2002).....	11

Statutes

RCW 58.17.200	34
RCW 58.17.205	34-35
RCW 64.04.010	10
RCW 64.04.020	10

Other Authorities

<i>Stoebuck & Weaver</i> , 17 Wash. Practice Series, Real Estate: Property Law (2d ed. 2004)	14
<i>Stoebuck & Weaver</i> , 18 Wash. Practice Series, Real Estate: Transactions (2d ed. 2004).....	12-13

I. INTRODUCTION

On June 13, 2002 appellant Grand Ridge and respondent Riverside entered into a purchase and sale agreement with regard to certain real estate (hereinafter "Agreement"). Grand Ridge owned a parcel of undeveloped land and Riverside was interested in purchasing building lots. Under the executed Agreement, Grand Ridge had a contractual obligation to subdivide the property through a county-approved, recorded subdivision plat and install the necessary infrastructure to create building lots. Following final plat approval, Riverside was obligated to purchase the resulting "finished lots" for a fixed price.

The first document the parties executed was the Real Estate Purchase and Sale Agreement (hereinafter "PSA")¹. The PSA did not contain a full legal description of the property to be conveyed, but the parties contractually created express mechanisms through which the legal description could be inserted at a later date. Specifically, the PSA obligated Grand Ridge to provide the complete legal description. Further, the PSA authorized the escrow agent to insert the correct legal description at closing. Later, Grand Ridge fulfilled its obligation to provide the legal description by obtaining a title report that contained a full metes and bounds description of the property. (CP 753-54, 760). Addendum 1 to the

¹ The originally executed document will be referred to as the "PSA" and the PSA and subsequent addenda globally will be referred to as the "Agreement".

PSA incorporated the complete legal description by referencing the title report.

After substantial development work, Clark County approved the final plat and it was recorded on March 30, 2006. (CP 593). Pursuant to the Agreement terms, Riverside was ready and willing to complete the sale. (CP 182). However, the development process was more expensive than expected, and Grand Ridge refused to convey the finished lots unless Riverside agreed to increase the purchase price. Riverside was forced to file a lawsuit against Grand Ridge for specific performance. (CP 1).

In the trial court, Grand Ridge argued that specific performance was not appropriate because Riverside allegedly made an oral agreement to increase the purchase price set forth in the Agreement. The trial court summarily rejected this argument, finding as a matter of law that there was no evidence that Riverside had agreed to modify the payment terms of the Agreement. (CP 944). Grand Ridge has abandoned this argument on appeal.

Grand Ridge's primary argument on appeal is that the Agreement is void under the statute of frauds because it did not contain an adequate legal description of the property to be conveyed. The trial court soundly rejected this argument. (CP 942-44). Well-settled Washington law establishes that the statute of frauds was satisfied because: (1) the PSA authorized escrow to insert the correct legal description at closing, and

(2) Addendum 1 to the Agreement expressly incorporated by reference the full legal description of the property contained in the commitment for title insurance supplied by Grand Ridge.

II. STATEMENT OF CASE

Grand Ridge's summary of the basic facts is incomplete and unclear in some respects. Certain facts and issues require clarification and elaboration.

1. The Agreement was more than just a contract to sell and buy a parcel of property. Under the PSA, Grand Ridge had a specific obligation to "create" the finished lots that the parties agreed to sell and buy. Paragraph 10f states: "Seller shall take any and all actions to record the subdivision and create the Finished Lots in a timely manner" (CP 12). Paragraph 12e states that the lots shall be deemed "finished lots" only after recording of the plat. (CP 13). Finally, Grand Ridge gave a specific representation and warranty in paragraph 9g that "[e]ach lot conveyed at closing shall be a legal lot in compliance with state statutes and local ordinances." (CP 12). Grand Ridge also had an obligation to construct improvements necessary to build on the lots, such as paved streets. (Paragraph 12i) and all utilities (Paragraph 12b). (CP 12-13).

Under these provisions, Grand Ridge had an affirmative obligation to create building lots by subdividing its property and obtaining final

approval of a subdivision plat. Only after Grand Ridge created "legal lots" and recorded the plat did its obligation to sell and Riverside's obligation to purchase the lots ripen. In other words, the transaction could not close until the lots had been brought into legal existence.

2. Paragraph 1 of the PSA specifically provided that Grand Ridge "warranted" that the legal description in the PSA was correct. The PSA further stated that if the legal description recited in the PSA was not a complete legal description of the property to be conveyed, "Seller shall provide Buyer with a complete legal description." (CP 7). In other words, Grand Ridge had a contractual obligation to provide the proper description.

Grand Ridge complied with its obligation in two ways. First, Grand Ridge was required to procure title insurance. The commitment for title insurance provided a full metes and bounds description of the undivided property that Grand Ridge owned, from which the lots would be created. (CP 760). This was the full legal description at that time. This description was specifically referenced in Paragraph 1 of Addendum 1. (CP 23).

Second, once the subdivision plat was recorded the legal description of the property changed. Instead of a metes and bounds description, the now subdivided property was properly described as certain lots within a specific plat. Accordingly, Grand Ridge provided the

"complete" legal description required in the Agreement by recording the plat. The commitment to title insurance incorporated by Addendum 1 later was supplemented to reflect this new legal description. (CP 386). And this description was contained in the closing documents prepared by escrow: "Lot 1 through 20, Grand Ridge Phase IV, according to the plat thereof, recorded in Volume 311 of Plats, page 367, records of Clark County, Washington." (CP 386).

3. Grand Ridge seems to suggest that the property to be conveyed somehow changed between execution of the PSA and the date of tendered closing. This suggestion is completely wrong. The property itself never changed. All that changed was the legal description of that property, and the parties contemplated this change when they signed the PSA.

When Grand Ridge obtained a commitment for title insurance (as required in Paragraph 11 of the PSA), that commitment contained the full metes and bounds description of the four corners of the property that Grand Ridge owned and Riverside contracted to purchase. Once the subdivision plat was approved and recorded, the exterior boundary of the property did not change. All that was different was that within that boundary, the property had been divided into 20 separate building lots, plus the streets and a detention pond.

Significantly, after plat recording Riverside tendered the purchase of the entire four corners of Grand Ridge's property – the same property described using metes and bounds in the commitment to title insurance, the same property described in Addendum 1 with reference to the commitment for title insurance, and the same property described in the recorded subdivision plat. The only portion of the property Riverside would not be buying was the roads and the detention pond, but at the time of closing those had been dedicated to the county as part of the development process. (CP 593 – notes 1, 10; CP 768).

4. Grand Ridge complains about "errors and irregularities" in the Agreement, and notes that the parties ended up executing eight addenda. The implication is that the agreement somehow is too confusing to enforce. Riverside acknowledges that the Agreement did contain mistakes, including an incorrect reference to Oregon law², problems with attachment of exhibits and typographical errors. The Agreement certainly could have been prepared with more care. However, whether or not the agreement drafting was "sloppy" does not render the Agreement void or unenforceable, and is completely immaterial to this appeal.

² Paragraph 21c of the PSA states that the Agreement should be construed in accordance with Oregon law. Even though Oregon law arguably is more liberal with regard to the statute of frauds, Riverside conceded in the trial court that application of Washington law was appropriate.

There never has been any confusion regarding the provisions involving property description, Grand Ridge's obligation to create finished lots, or the other important provisions of this Agreement. Grand Ridge signed the PSA as well as Riverside, and Grand Ridge specifically represented in Paragraph 21e that "each party and its counsel have reviewed and revised this Agreement". (CP 17). Having reviewed and executed the PSA, Grand Ridge cannot now attempt to avoid its obligations because of immaterial drafting mistakes. Further, Grand Ridge's principal Jeff Dulcich admitted that there was no question in his mind what property would be conveyed. (CP 200, 207 – Dulcich Dep. at 58:24-59:4; 88:2-6). Grand Ridge's development agent Tony Plescia admitted the same thing. (CP 250 – Plescia Dep. at 112:19-21).

5. Grand Ridge suggests that the Agreement became unfair because the parties contemplated a sale of 22 lots in the PSA, the number of lots was reduced to 21 in Addendum 1, and the final plat only included 20 lots. Grand Ridge also complains that the dimensions of the lots changed from the original plan. However, the parties specifically anticipated that the number of lots might decrease and the dimensions of the lots might change during the development process. Paragraph 10f stated that Grand Ridge had a specific obligation to "inform the Buyer of any material changes to the proposed lots as shown on Exhibit A, e.g., the number of lots, the dimensions of lots." (CP 12). Further, the Agreement

expressly allocated to Grand Ridge the risk that the number of lots would be reduced. Paragraph 2 of the PSA and Paragraph 2 of Addendum 1 specifically provided for a reduction of the purchase price if the number of lots went below 22 (PSA) or below 21 (Addendum 1). (CP 7; CP 23). Paragraph 2 of Addendum 1 was revised in Addendum 7, which once again provided for a price reduction if the number of lots was reduced below 21. (CP 35).

Grand Ridge also argues that the parties should have executed another addendum when the final plat included 20 lots rather than the 21 lots contemplated in Addendum 1. However, there was no need for such an addendum. Addendum 1 specifically provided what would happen if the number of lots was reduced:

In the event the lot yield is less than Twenty-One (21) finished lots, the purchase price herein shall be reduced by \$61,000 per finished lot less than Twenty-One (21).

(CP 35).

6. At the time Riverside was prepared to close the transaction, all contractual obligations had been satisfied or waived. Grand Ridge had fulfilled its primary obligation – to create the finished lots. The final plat was approved and recorded on March 30, 2006. (CP 593). Other Agreement conditions remained uncompleted, but Paragraph 15a of the PSA provided that "Buyer, at its option, may elect to waive the performance of any condition, contingency or provision in Buyer's favor

set forth in this Agreement." (CP 15). Similarly, Paragraph 5b provided that "Seller agrees that Buyer may elect, in its sole discretion, to waive all contingencies and accelerate the closing schedule at anytime during this Agreement." (CP 8).

On May 11, 2006 Riverside notified Grand Ridge that it was willing and able to close, and tendered performance of its obligation to close under the PSA. (CP 182). Escrow then prepared the appropriate closing documents, which included the correct legal description of the lots with reference to the recorded plat. (CP 377). Grand Ridge had a binding obligation to close at that time.

7. In the trial court Grand Ridge made no secret of the real reason it refused to close, and that reason had nothing to do with the statute of frauds or the description of the property to be conveyed. Grand Ridge was upset because its development costs were higher than it had estimated, and the number of lots had been reduced. (CP 240-41 – Plescia Dep. at 71-77). As a result, Grand Ridge faced making less money on the transaction than originally contemplated. (CP 238 – Plescia Dep. at 64:11-16). Grand Ridge's entire statute of frauds argument is nothing more than an attempt to invent technical arguments to escape what it now perceives to be a "bad deal".

In the trial court Grand Ridge's primary claim was that Riverside had made an oral agreement to increase the purchase price. However, the

undisputed evidence was that Riverside never made such an agreement, oral or otherwise. (CP 236, 239, 249 – Plescia Dep. at 57:6-10; 66:25-67:12; 106:22-107:2) and that there was no consideration for any such agreement. The trial court rejected Grand Ridge's arguments and granted summary judgment on this issue. (CP 944). Grand Ridge has abandoned this issue on appeal. Grand Ridge's only remaining excuse to avoid its contractual obligations is based on the statute of frauds.

III. ARGUMENT

A. **LEGAL BACKGROUND**

1. Statute of Frauds

The statute of frauds provides that all conveyances of real estate must be by deed, in writing. *See* RCW 64.04.010; RCW 64.04.020. Washington courts hold that "in order to comply with the statute of frauds, a contract or deed for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony." *Key Design, Inc. v. Moser*, 138 Wn.2d 875, 881, 983 P.2d 653 (1999), quoting *Martinsen v. Cruikshank*, 3 Wn.2d 565, 567, 101 P.2d 604 (1940). Generally this rule requires a full legal description of the property. *See Key Design*, 138 Wn.2d at 882.

The statute of frauds applies to contracts pertaining to the future transfer of title to property, such as purchase and sale agreements. *Key*

Design, 138 Wn.2d at 882; *Martin v. Seigel*, 35 Wn.2d 223, 229, 212 P.2d 107 (1949).³

In general the statute of frauds should be applied narrowly. *Firth v. Lu*, 146 Wn.2d 608, 614, 49 P.3d 1117 (2002). “The statute of frauds must be strictly construed by courts and not applied to cases that are not squarely within its terms.” *Western Farm Service, Inc. v. Olsen*, 114 Wn. App. 508, 516, 59 P.3d 93 (2002). Strict construction is particularly appropriate when the contracting parties “clearly understood the boundaries of the property subject to sale.” *See Dunbabin v. Allen Realty Co.*, 26 Wn. App. 660, 665, 613 P.2d 570 (1980). This is because “[t]he underlying purpose of a statute of frauds is to prevent fraud, not be a means of perpetrating one.” *Western Farm*, 114 Wn. App. at 516.

There are two well-settled exceptions to the general rule that a purchase and sale agreement contain a legal description of the property to be conveyed. First, a purchase and sale agreement is valid if it authorizes a third party (typically a real estate agent or escrow agent) to later insert the correct legal description. Second, a purchase and sale agreement that contains no legal description is valid if it references another document that does contain an adequate description of the property. *See generally*

³ *But see Key Design*, 138 Wn.2d at 889-92 (Sanders, J., dissenting) (arguing that the statute of frauds should not apply to purchase and sale agreements because they do not involve a present transfer of title to property).

Stoebuck & Weaver, 18 Wash. Practice Series, Real Estate: Transactions § 16.3 at 225-26 (2d ed. 2004).

In this case, even if the description of the property in the PSA as initially executed was not sufficient to satisfy the statute of frauds, **both exceptions referenced above apply in this case**. The PSA did authorize the escrow agent to insert the correct legal description. And Addendum 1 to the Agreement did reference the commitment for title insurance, which contained a full legal description of the property. Accordingly, the parties did satisfy the statute of frauds and the trial court's ruling must be affirmed.

2. Purchase and Sale Agreements

The contract between Grand Ridge and Riverside was a real estate purchase and sale agreement, also commonly known in Washington as an “earnest money agreement”. These agreements constitute a written manifestation of an oral agreement between a seller and a buyer for the purchase and sale of real property. The agreement outlines the terms of a sale, and requires both parties to “close” the transaction at some time in the future following the satisfaction of certain conditions. *See generally* Stoebuck & Weaver, 18 Wash. Practice Series, Real Estate: Transactions §16.1 at 215-16.

An important concept regarding purchase and sale agreements is that the agreement does not itself convey title or any other interest in

property. Instead, a purchase and sale agreement necessarily refers to some future time at which the parties will complete the transaction and transfer title. *See Rigby v. State*, 49 Wn.2d 707, 710, 306 P.2d 216 (1957); *Nelson v. Great Northwest Federal Savings & Loan Assoc.*, 37 Wn. App. 316, 318-19, 679 P.2d 953 (1984); *Stoebuck & Weaver*, § 16.1 at 216.

For instance, in *Nelson* the plaintiff entered into a purchase and sale agreement for a condominium in a building that was under construction. Before construction was complete – and before the transaction closed – the seller went into foreclosure on the building. The court held that the plaintiff had not procured any present ownership interest in the condominium:

The agreement contains no language purporting to convey the Coles a legally enforceable interest in real estate. The entire agreement is subject to completion of construction of the building. The Coles were entitled to possession upon closing, but the transaction was never closed.

37 Wn. App. at 318-19.

The fact that a purchase and sale agreement represents an agreement to convey title in the future is important for statute of frauds purposes. As discussed below, this fact means that a correct legal description is not necessarily required when a purchase and sale agreement is executed as long as authorization is provided to insert the description before closing. It also compels the conclusion that specific lots to be

conveyed need not “exist” at the time the purchase and sale agreement is executed as long as they have been "created" by the time of closing.

3. **Finished Lot Agreements**

The purchase and sale agreement at issue in this case is known as a “finished lot” agreement, which is popular among developers of residential property. Under this type of agreement, the owner of undeveloped land agrees to go through the development process and obtain governmental approval of a plat dividing the property into smaller lots⁴. A finished lot agreement provides that upon recordation of the approved plat, the owner agrees to sell and the buyer agrees to purchase the lots that have been created.

The undisputed evidence in this case is that finished lot contracts are common among real estate developers. Riverside enters into agreements to purchase finished lots in one-third to one-half of all its transactions. (CP 311 - Wagoner Dep. at 29:1-10; CP 380 – Boyce Decl. at ¶ 2). Grand Ridge also has been involved in several other finished lot transactions. The trial court record contains five finished lot agreements which have been executed by Grand Ridge (or its principals/agents). (CP 462-505).

⁴ A good overview of the subdivision process is contained at Stoebuck & Weaver, 17 Wash. Practice Series, Real Estate: Property Law § 5.1 at 272-74; § 5.7 at 297-98 (2d ed. 2004).

Finished lot agreements are popular among developers like Grand Ridge because they provide a basis for obtaining the financing necessary to proceed with the development process. In this case, Grand Ridge submitted the Riverside Agreement to its construction lender in order to provide them a greater inducement to issue a loan to pay for its development costs. (CP 199 – Dulcich Dep. at 55:2-5, 14-19). It is important for lenders to see that a developer has a guaranteed sale before loaning money to fund the subdivision process.

Finished lot agreements require special attention when applying the statute of frauds because the property description at the time a purchase and sale agreement is executed necessarily will change before closing. (CP 382 – Boyce Decl. at ¶ 6). When the agreement is executed the undivided property can only be described as a certain number of lots to be created within the metes and bounds description of the undeveloped parcel. Once the owner has completed the development process as required in the agreement, the legal description is revised to reflect that the property has been subdivided. For this reason, the parties to finished lot purchase and sale agreements often authorize a third party – such as an escrow agent – to insert the correct legal description once the final plat has been approved. Grand Ridge and Riverside provided such an authorization in this case. (CP 382 – Boyce Decl. at ¶ 6).

B. PARAGRAPH 1 OF THE PSA SATISFIED THE STATUTE OF FRAUDS BY AUTHORIZING A THIRD PERSON TO INSERT THE CORRECT LEGAL DESCRIPTION BEFORE CLOSING.

1. The Parties Did Satisfy the Statute of Frauds by Authorizing Escrow to Add the Correct Property Description.

Washington law is clear that the parties to a purchase and sale agreement can satisfy the statute of frauds by designating an agent to insert the correct legal description before closing. Such a designation is effective even if the agreement does not include any legal description when the parties sign. *E.g., Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007); *Noah v. Montford*, 77 Wn.2d 459, 462-63; *Edwards v. Meader*, 34 Wn.2d 921, 923-25, 210 P.2d 1019 (1949).

In *Nishikawa*, two parties signed a purchase and sale agreement that apparently did not include any legal description of the commercial property to be conveyed. However, the agreement contained the following clause: "Buyer and Seller authorize the Listing Agent or Selling Licensee to insert and/or correct, over their signatures, the legal description of the Property." 138 Wn. App. at 844-46. The seller became unhappy with the agreement because it did not contain an environmental indemnity clause. When the buyer declined to re-negotiate, the seller instructed the parties' real estate agent not to add the legal description to the contract. The agent

added the legal description anyway, but the seller refused to close. The buyer then sued for specific performance. *Id.* at 844.

This Court held that the purchase and sale agreement did satisfy the statute of frauds because it authorized an agent to insert the legal description. Further, the Court held that because the parties mutually authorized the agent to insert the legal description, the seller could not unilaterally revoke that authorization. *Id.* at 848-49. Once the agent entered the legal description, the contract became fully valid for statute of frauds purposes.

Our case is very similar to *Nishikawa*. Paragraph 1 of the PSA expressly provides as follows:

Seller and Buyer hereby authorize Escrow to insert over their signatures the correct legal description of the real Property.

(CP 7). This language is almost identical to the language approved in *Nishikawa*. Further, when Riverside indicated that it was ready to close the transaction, the escrow agent prepared a statutory warranty deed that included the correct legal description. (CP 377; CP 140).

Nishikawa controls. The parties authorized the escrow agent to insert the correct legal description, and therefore complied with the statute of frauds. The trial court's grant of summary judgment on this basis must be affirmed.

2. Grand Ridge's Arguments Do Not Prevent Application of *Nishikawa* in this Case.

Grand Ridge does not attempt to argue that *Nishikawa* is inapplicable. Instead, Grand Ridge claims that the escrow authorization clause was deleted or altered in Addendum 1, or that the *Nishikawa* rule should not apply when undeveloped land is being converted into finished lots. None of these arguments has any merit.

a. Addendum 1 Did Not Delete the Authorization for Escrow to Insert the Correct Legal Description.

Grand Ridge argues that the provision allowing escrow to insert the correct legal description was deleted by Paragraph 1 of Addendum 1. However, the plain language of the Addendum makes it clear that the escrow authorization clause was not deleted.

Paragraph 1 of Addendum 1 provides: "The **description of the Property** in Paragraph 1 of the Agreement is hereby deleted and replace[d] with the following". (CP 23) (emphasis added). The paragraph then provides a different property description. Grand Ridge claims that this clause deleted the entire Paragraph 1 of the PSA. However, a review of the language of Paragraph 1 itself and of Addendum 1 demonstrates that this clause only deleted the "description of the Property" in Paragraph 1, not the entire paragraph.

First, the structure of Paragraph 1 of the PSA shows a clear distinction between the description of the property and the clause

authorizing escrow to insert the correct legal description. Paragraph 1 consists of two subparagraphs. The first subparagraph contains a description of the property. The second subparagraph – set off by an extra double-space – contains the escrow authorization clause. The second subparagraph refers to the "above legal description", indicating that the escrow authorization clause is not itself part of the legal description.

Second, other sections of Addendum 1 demonstrate that the parties knew how to completely delete a paragraph from the PSA. Paragraph 4 of Addendum 1 states that two exhibits are "deleted in their **entirety**". Paragraph 6 of Addendum 1 provides that "Paragraph 7.c. of the Agreement is hereby deleted in its **entirety**". (CP 24). If the parties had intended to delete Paragraph 1 of the original PSA in its entirety, they certainly would have so provided. Instead, they stated only that the "description of the Property" in Paragraph 1 was deleted. The clause authorizing escrow to insert the correct legal description remained in force.

Grand Ridge's only other argument is that despite the language of the agreement, Jeff Dulcich (Grand Ridge's principal) "understood" that Paragraph 1 of Addendum 1 was intended to replace all of Paragraph 1 of the PSA. (CP 393). However, under basic principles of contract interpretation, what Mr. Dulcich "understood" is immaterial. In construing a written contract, the intent of the parties controls and the

court ascertains this intent from reading the contract language. Interpretation of an unambiguous contract is a question of law. *E.g., Dice v. City of Montesano*, 131 Wn. App. 675, 683-84, 128 P.3d 1253 (2006). Accordingly, how Mr. Dulcich interpreted the contract had no effect on the trial court's grant of summary judgment and has no relevance to this Court's de novo construction of the contract language.

b. The Authority of Escrow is Not Limited to the Property Description in Exhibit C to Addendum 1.

Grand Ridge argues in one sentence (Appellant's Opening Brief at 24) that the escrow agent's authority was limited to using the legal description contained in Exhibit C to Addendum 1. The Court need not consider this argument because Grand Ridge provided no explanation and cited no authority for its position. In any event, this argument makes no sense.

Grand Ridge's position apparently is based on Paragraph 1 of Addendum 1, which states that the correct legal description is attached as Exhibit C. (CP 23). Unfortunately, the parties mistakenly attached a diagram of the proposed plat as Exhibit C rather than the document referenced in Paragraph 1 – Schedule A of the commitment for title insurance. (CP 26). However, this paragraph did specifically identify and reference the commitment for title insurance, regardless of whether that document was attached. Further, nothing in the PSA or in Addendum 1

indicates that the escrow agent's authority was limited to using the "description" contained in Exhibit C. Paragraph 1 of the PSA clearly provides that the escrow agent is authorized to insert the "correct legal description". (CP 7). The diagram attached as Exhibit C to Addendum 1 was not a correct legal description, and therefore has nothing to do with the escrow agent's authority.

c. There is No Requirement that the Lots be in Existence at the Time the Agreement is Executed for Application of the *Nishikawa* Rule.

Grand Ridge spends only one paragraph (three sentences) (Appellant's Opening Brief at 28) supporting its claim that "escrow does not have the authority to describe future lots" (Appellant's Opening Brief at 26). Grand Ridge's complete argument (without an explanation) is that permitting escrow to wait until the lots are created before inserting a legal description (1) is not supported by a reading of *Nishikawa*, and (2) contravenes the holding in *Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564 (1995). Grand Ridge's position apparently is that "legal" lots must already exist when a purchase and sale agreement is executed for the *Nishikawa* rule to apply.

Neither *Nishikawa* nor *Berg* supports Grand Ridge's argument. Further, Grand Ridge provides no other authority for its argument, and also fails to explain why the *Nishikawa* rule should prevent an escrow

agent from waiting until lots are created before inserting a correct property description.

First, *Nishikawa* says nothing at all about whether or not lots have to exist at the time the purchase and sale agreement is executed. However, this Court did state the rule in very broad terms:

But the contractors need not include the legal description when they sign the contract. They may instead appoint an agent to addend or write in the legal description.

138 Wn. App. at 849. The court did not hold, suggest or event hint that an escrow agent could not wait until lots are created before inserting the correct legal description.

Second, *Berg* has nothing to do with authorizing a third party to insert the correct legal description. As discussed in Section C.4 below, *Berg* addressed the second exception to the statute of frauds – reference to a separate document that contains the correct legal description. The contract in *Berg* apparently did not provide that an agent could insert the correct legal description (or at least such a clause was not discussed in the case).

Third, Grand Ridge provides no relevant authority for its position. No Washington case indicates that the *Nishikawa* rule somehow is inapplicable when undeveloped property will be converted to subdivided lots before closing.

Fourth, Grand Ridge does not explain why an escrow agent should not be allowed to wait until the lots were created before inserting the correct legal description. Clauses of the type approved in *Nishikawa* and used in this case obviously are designed for use in development contracts like the one in this case, where the legal description changes after the property is subdivided. (CP 382 – Boyce Decl. at ¶ 6). Otherwise, the description would be inserted in the original agreement. Further, the clause obviously contemplates that the correct legal description will be inserted at some time in the future. Why wouldn't an escrow agent be allowed to wait until the plat is recorded and the property description changes at some point in the future before inserting the legal description?

Finally, it is significant that Paragraph 1 of the PSA specifically provided that "Seller shall provide Buyer with a complete legal description". (CP 7). In other words, the escrow agent had nothing to insert until Grand Ridge provided the correct legal description. The legal description for the lots to be conveyed was not "provided" by Grand Ridge until the final plat was recorded in March 2006⁵. After that point the legal lots did exist, and the escrow agent had the ability – and the authority – to insert the correct legal description.

⁵ As discussed above, Grand Ridge had previously provided the legal description of its undivided property, which was contained in the commitment for title insurance.

3. Because the PSA Authorized the Escrow Agent to Insert the Correct Legal Description, All of Grand Ridge's Other Arguments Are Immaterial.

Grand Ridge makes various arguments – discussed below – concerning the reference in Addendum 1 to the legal description contained in the commitment for title insurance. It is important for the Court to understand that none of these arguments make any difference with regard to application of the escrow authorization clause approved in *Nishikawa*. If a third party is authorized to insert the correct legal description and does so – which is what occurred in this case – the statute of frauds is satisfied as a matter of law. A correct legal description is all that is needed under the statute of frauds, and the mutual authorization for an escrow agent to insert that correct description automatically fulfills that requirement. Consequently, Grand Ridge's other arguments make no difference. The continued discussion below is provided only in the event the Court for some reason finds *Nishikawa* inapplicable.

C. ADDENDUM 1 SATISFIED THE STATUTE OF FRAUDS BECAUSE IT REFERENCED ANOTHER DOCUMENT THAT CONTAINED A LEGAL DESCRIPTION OF THE PROPERTY.

1. The Parties Complied with the Statute of Frauds by Reference to the Commitment For Title Insurance, Which Contained a Correct Legal Description.

As stated above, the general rule is that a sufficient description of the property must be contained in a purchase and sale agreement. In

addition, however, the cases uniformly hold that the parties can satisfy the statute of frauds by referencing a separate document that contains a correct legal description. The classic recitation of this rule is found in *Bigelow v. Mood*, 56 Wn.2d 340, 341, 351 P.2d 429 (1960):

We have held consistently that, in order to comply with the statute of frauds, a contract or deed for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony, **or else it must contain a reference to another instrument which does contain a sufficient description.**

(Emphasis added). *See also Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995); *Dickson v. Kates*, 130 Wn. App. 724, 733-34, 133 P.3d 498 (2006).

In our case, Paragraph 1 of Addendum 1 specifically makes reference to "the property described in schedule A of the commitment for title insurance by Chicago Title Insurance Company Order Number K128398 with the effective date June 26, 2002 attached hereto as Exh. 'C'." (CP 23). The original version of Schedule A of the commitment for title insurance contained a complete metes and bounds description of the property being conveyed. (CP 760). Under the general rule stated above, the reference to another document containing a full legal description satisfies the statute of frauds.

Further, Schedule A of the commitment for title insurance also was amended after the final plat was approved and the legal description of the

property changed. The fourth amended supplemental commitment for title insurance (with an effective date of April 6, 2006) contained the "new" property description: "Lot 1 through 20, Grand Ridge Phase IV, according to the plat thereof, recorded in Volume 311 of Plats, Page 367, records of Clark County, Washington." (CP 386). As a result, at the time of closing the reference in the Agreement to the commitment for title insurance contained the full, legally binding description of the property.

2. The Fact that the Parties Mistakenly Failed to Attach the Correct Legal Description Contained in the Title Policy is Immaterial.

As noted above, Paragraph 1 of Addendum 1 states that attached as Exhibit C to the Addendum is Schedule A of the commitment for title insurance issued by Chicago Title Insurance Company on June 26, 2002. (CP 23). Instead of attaching the commitment for title insurance (containing the legal description of the property), someone mistakenly attached as Exhibit C a diagram of the proposed plat. (CP 26). Nevertheless, the fact that the commitment for title insurance was not attached is immaterial for statute of frauds purposes.

First, as long as the purchase and sale agreement specifically references another document, there is no requirement that the document actually be attached. The court in *Knight v. American National Bank*, 52 Wn. App. 1, 756 P.2d 757 (1988), addressed a situation identical to this case. In *Knight*, the purchase and sale agreement briefly identified the

property and stated that it was more particularly described in Exhibit A, and also stated that a site plan was set forth in Exhibit B. Neither exhibit was attached. *Id.* at 4. The court held that the statute of frauds had been satisfied because the site plan (which contained a full legal description) had been referenced, even though it had not been attached to the purchase and sale agreement. *Id.* at 5-6. The same rule applies in our case.

Second, in this case attaching a plat diagram rather than the commitment for title insurance clearly was a mutual mistake. This is not a situation where the contract itself is ambiguous and the identity of an exhibit is unclear. Addendum 1 very specifically identified the commitment for title insurance by name, insurance company, order number and date, and stated that this document would be attached as Exhibit C. That document was in existence and was capable of being identified without reference to extrinsic evidence. (CP 753, 760). Inexplicably, neither party attached the title insurance document and something completely different was attached.

Under the Agreement Grand Ridge had an affirmative obligation to procure title insurance and to provide a correct legal description. Arguably, it was Grand Ridge's obligation to attach the correct document.

"If the intention of the parties is identical at the time of the transaction, and the written agreement does not express that intention, then a mutual mistake has occurred." *Tenco, Inc. v. Manning*, 59 Wn.2d 479,

483, 368 P.2d 372 (1962). For purposes of a statute of frauds analysis, an agreement may be reformed to reflect the parties' intent. *Id.* at 485. Attaching the wrong Exhibit C was a classic mutual mistake. Clearly both parties contemplated that the commitment for title insurance would be attached as Exhibit C. Accordingly, the contract must be reformed, and for statute of frauds purposes the commitment for title insurance must be treated as Exhibit C to Addendum 1.⁶

3. Grand Ridge Conceded in the Trial Court that Reference to a Complete Legal Description in a Purchase and Sale Agreement Satisfies the Statute of Frauds.

Grand Ridge's position in this appeal is puzzling because there is absolutely no question under Washington law that reference in a purchase and sale agreement to another document containing a complete legal description satisfies the statute of frauds. In fact, Grand Ridge admitted in the trial court that if a legal description was referenced in the Agreement, Grand Ridge had no case.

The statute of frauds could have easily been satisfied in this case by simply inserting in, attaching to, or referencing in the PSA a current and complete legal description of the property that was to be subject to the subdivision.

(CP 796 at lines 1-3).

⁶ Riverside did not address reformation in the trial court. However, this Court can affirm a grant of summary judgment on any basis – even based on arguments not raised below. *See Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003); RAP 2.5(a).

Could the parties have drafted an agreement to accomplish their objectives? Of course. Grand Ridge concedes that **if the PSA had contained, attached or referenced an adequate legal description of the entire parcel** that was to be conveyed, then the statute of frauds would have been satisfied and **“we wouldn’t be here.”**

(CP 797-98 at lines 797:20-798:2) (emphasis added).

Here, it is undisputed that Paragraph 1 of Addendum 1 did reference the full legal description in the commitment to title insurance. Further, that legal description would have been attached to Addendum 1 but for a mutual mistake. In Grand Ridge's own words, both facts "easily" satisfy the statute of frauds.

4. The Berg Case is Inapplicable Because Addendum 1 Referred to an Existing Document.

Grand Ridge relies heavily on *Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564 (1995). In that case, the court invalidated a grant of an easement because the only description of the servient estate (the parcel over which the easement will run) referred to a non-existent instrument. Because Addendum 1 referred to a document that clearly did exist – the commitment for title insurance – *Berg* is inapplicable in this case.

In *Berg* the grantor purported to convey an easement across a servient estate described as certain portions of lots that would be created when a subdivision application was approved and recorded. In other words, the only description of the servient estate was with reference to a document – the approved final plat – that would not come into existence

for another four years. *Id.* at 549, 551. The court had little trouble ruling that the easement grant did not comply with the statute of frauds because it "did not contain a sufficient description of the land nor did it reference an instrument which did contain such a description." *Id.* at 551, 552-53.

The facts in *Berg* demonstrate the problem with only referencing an instrument that has not yet been created. In that case, the grant described the easement as being over a portion of Lots F and G in the short plat to be recorded at some future time. But there was no Lot G in the recorded plat. Further, the grant described no easement over Lot E, but on the recorded plat the purported easement appeared to be located entirely on Lot E. *Id.* at 549.

Our case is completely different. Addendum 1 did not reference a non-existent instrument. Instead, it referenced a document that already had been created: "Schedule A of the commitment for title insurance by Chicago Title Insurance Company Order No. X128398 with the effective date June 26, 2002". (CP 23). This commitment for title insurance contained a full metes and bounds description of Grand Ridge's property. (CP 760). Riverside did prepare closing documents to purchase Grand Ridge's entire property as described (less roads and pond dedicated to the County). As a result, *Berg* is completely immaterial.

Significantly, the court in *Berg* pointed out that the easement grantor probably would have complied with the statute of frauds if the

granting clause had described the entire parcel of undeveloped property rather than just describing portions of that property as a servient estate. *Berg*, 125 Wn.2d at 552-53. That is exactly what the parties did in our case. The commitment for title insurance describes the entire parcel owned by Grand Ridge, and that document was referenced in Addendum 1.

5. The *Howell* Case is Inapplicable Because the PSA Did Specify the Portion of Grand Ridge's Property to Be Conveyed.

Grand Ridge also relies on the general rule stated in *Howell v. Inland Empire Paper Co.*, 28 Wn. App. 494, 495, 624 P.2d 739 (1981) invalidating a property description that refers only to an unspecified portion of a larger parcel. The court stated:

It is also well settled that a description which designates the land conveyed as a portion of a larger tract without identifying the particular part conveyed does not meet the requirements of this rule [statute of frauds].

Id. at 495. However, this rule is inapplicable in our case.

Grand Ridge points to the language in Paragraph 1 of Addendum 1 stating that the property conveyed was 21 finished lots "contained with[in] the boundaries" of the property described in the commitment for title insurance. However, the crucial requirement for application of the rule in *Howell* is that the portion of the larger parcel being conveyed must be **unspecified**. For instance, in *Howell* the land was described only as "portions" of certain tracts without any further explanation. 28 Wn. App.

at 495. Similarly, in *Ecolite Manufacturing Co. v. R.A. Hanson Co.*, 43 Wn. App. 267, 269, the property was described using “approximate” dimensions. In both cases, the property description was defective because it was impossible to determine exactly what property was being conveyed. *See also Garrett v. Shriners Hospitals for Crippled Children*, 13 Wn. App. 77, 78-79, 533 P.2d 144 (1975) (describing the property as a certain number of acres within a larger tract without describing the dimensions of the property conveyed).

In our case, the parties did not identify the property being conveyed as "portions" of the Grand Ridge parcel, did not use approximate dimensions, and did not fail to provide any dimensions at all. Instead, Addendum 1 described exactly what would be conveyed – 21 finished lots to be created from Grand Ridge's parcel. In other words, the property being conveyed was not unspecified.

Finally, this argument ultimately is moot because the final plat includes the entire Grand Ridge parcel described in the commitment to title insurance (CP 593), less the streets and the pond (which were dedicated to the county by Grand Ridge). (CP 593 – note 1, 10; CP 768). The closing documents (which Grand Ridge refused to sign) provide for conveyance of all lots in the plat. (CP 377). Consequently, by reference to the commitment to title insurance Addendum 1 fully and completely described the property that was being conveyed.

D. A PURCHASE AND SALE AGREEMENT FOR THE SALE OF LOTS TO BE CREATED IN THE FUTURE IS NOT INVALID.

As discussed above, the two primary exceptions to the statute of frauds – authorizing a third person to insert the correct legal description and referencing another document containing the legal description – clearly are applicable in this case. Nevertheless, Grand Ridge seems to argue that **all** agreements involving the future development and sale of finished lots somehow are invalid. According to Grand Ridge, a purchase and sale agreement is void if the lots being sold are not actually “in existence” at the time the agreement is signed. However, Grand Ridge has no authority for this novel concept, and does not explain why the parties cannot contract to sell and buy lots that will be created as part of the development process.

This Court should reject Grand Ridge’s argument for several reasons. **First**, Grand Ridge never argued in the trial court that these types of finished lot agreements are inherently unenforceable. In fact, in the trial court Grand Ridge admitted that a purchase and sale agreement could provide for the conveyance of future lots as long as the statute of frauds was satisfied. "In other words, Grand Ridge agrees that a PSA can be conditioned on a seller producing a set of 'finished' lots, provided the PSA satisfies the statute of frauds." (CP 796 at lines 3-5).

Grand Ridge's argument in the trial court was that Addendum 1 did not reference a full legal description and that *Berg* precluded enforcement of an agreement that referenced only future lots and not the legal description of the undeveloped property. As discussed above, those arguments were incorrect – Addendum 1 does specifically reference the commitment for title insurance, which contained the full metes and bounds description of the property that would be subdivided into lots.

Second, the Washington legislature expressly has approved purchase and sale agreements regarding lots that have not yet been created. RCW 58.17.200 generally prohibits the sale of lots that have not been subdivided. However, RCW 58.17.205 contains a specific exception:

If performance of an offer or agreement to sell, lease, or otherwise transfer a lot, tract, or parcel of land following preliminary plat approval is expressly conditioned on the recording of the final plat containing the lot, tract, or parcel under this chapter, the offer or agreement is not subject to RCW 58.17.200

In other words, the legislature established that agreements to sell lots to be created are proper as long as preliminary plat approval is obtained and the agreement is conditioned on the recording of the final plat.

In this case, preliminary plat approval occurred on April 28, 2003. (CP 569-575). The PSA was executed before that date. However, as the trial court recognized, Addendum 8 was executed on September 8, 2004,

more than a year after preliminary plat approval. That addendum referenced the PSA and all prior addenda, and confirmed that the terms and conditions of the Agreement would remain the same and continued in full force and effect. (CP 37). As a result, the parties did reaffirm the agreement to sell the lots after preliminary plat approval, and therefore the Agreement fell within the scope of RCW 58.17.205. And under Paragraph 12e the sale of the lots was expressly conditioned on recording of the final plat as required in the statute. (CP 13).

Third, Grand Ridge seems to confuse purchase and sale agreements with deeds or other instruments that actually transfer property rights. Grand Ridge repeatedly argues that the Agreement purported to convey lots that do not currently exist, which violates the statute of frauds. (E.g., Appellant's Opening Brief at 18, 21). However, as discussed in Section A2 above, a purchase and sale agreement does not **convey** anything. A deed or a grant of easement that involves a present transfer of property interests obviously cannot be based on property that does not exist. But a purchase and sale agreement does not transfer any property interest, and instead constitutes an agreement of the party to transfer a property interest at some future time.

The distinction between a present conveyance of interest and an agreement to convey an interest in the future distinguishes the *Berg* case from our case. *Berg* involved a grant of an easement – which does involve

a present transfer of property rights – not a purchase and sale agreement. It makes no sense to grant an easement over certain lots that have not yet even been created. It is quite different to agree to convey lots in the future after those lots have been created through the subdivision process.

Fourth, Grand Ridge ignores the fact that the finished lot contract in this case represents more than just an agreement to buy and sell certain property. Under the Agreement, Grand Ridge specifically agreed to undertake the development process and procure a recorded plat. Paragraph 10 of the PSA (entitled “Seller’s Obligations Pending Closing”) states in subparagraph (f) that “Seller shall take any and all actions to record the subdivision and create the Finished Lots in a timely manner” (CP 12). Paragraph 14 specifically provides that compliance with the seller’s obligations (including finished lots) was a condition precedent to closing. (CP 14). Finally, Paragraph 1 specifically requires Grand Ridge to provide Riverside with a “complete legal description”. (CP7). A complete legal description could not be provided until after the plat was recorded.

Under the Agreement, it would have been impossible for Grand Ridge to convey “nonexistent” lots. Grand Ridge had a contractual obligation to go through the subdivision process and record a plat. Once the plat was recorded, the lots were brought into existence by operation of

law. Only after that point could the transaction be closed, and an ownership interest in the newly created lots could be conveyed.

Fifth, Grand Ridge once again has produced no authority supporting its argument that all purchase and sale agreements for the future development of finished lots are invalid. The only case Grand Ridge cites is *Berg*, which as discussed above does not even involve a purchase and sale agreement and is easily distinguished. The absence of any authority is fatal to Grand Ridge's position, particularly in light of undisputed evidence that finished lot agreements are regularly used by developers.

Sixth, upholding Grand Ridge's argument that this Agreement was inherently invalid would operate to perpetrate a fraud on Riverside. Grand Ridge voluntarily entered into a finished lot agreement. Grand Ridge acknowledged in Paragraph 21e of the PSA that "each party and its counsel have reviewed and revised this Agreement". (CP 17). To allow Grand Ridge to void the Agreement under these circumstances would be unfair and unjust.

In summary, there is no compelling reason to hold as a matter of law that a purchase and sale agreement cannot provide for the future transfer of lots that have not yet been created, with closing conditioned on the creation of those lots. Grand Ridge has no authority for its position, and provides no meaningful explanation why such contracts should be

void. The nature of purchase and sale agreements and the specific terms of this Agreement make it clear that the parties were not attempting to convey nonexistent lots, but instead were addressing the future transfer of lots conditioned on Grand Ridge's obligation to record a plat creating the lots. Accordingly, this Court must reject Grand Ridge's "catch-all" argument that all contracts for the future development of finished lots are invalid.

E. NO BASIS EXISTS FOR GRAND RIDGE'S ARGUMENT THAT THE AGREEMENT IS VOID BECAUSE THERE IS NO MEETING OF THE MINDS.

Grand Ridge complains about the provisions in the Agreement allowing Riverside to close in two phases. Grand Ridge claims that there was no "meeting of the minds" with regard to the entire Agreement because the agreement was unclear as to what lots Riverside would purchase and in what order. However, Grand Ridge has twisted the language of the Agreement, and there is no uncertainty with regard to Riverside's purchase of all the created lots. In addition, after the plat was recorded, Riverside waived its ability to close in phases and expressed its willingness to close on all lots. (CP 182). Accordingly, Grand Ridge's argument is moot.

First, Grand Ridge's suggestion that Riverside was not required to purchase all the lots in the approved plat is incorrect. Nothing in the

Agreement indicates that Riverside could “pick and choose” what lots it wanted to purchase. The only relevant provision in the PSA (Paragraph 5a) and Paragraph 1 of Addendum 2 provided only that Riverside had the right to close the transaction in two phases, for 11 lots in the first phase and the remainder in the second phase. (CP 8; CP 27). There was a very clear meeting of the minds that Riverside would purchase all the finished lots.

Second, Paragraph 5b of the PSA states as follows: “Seller agrees that Buyer may elect, in its sole discretion, to waive all contingencies and accelerate the closing schedule at anytime during this Agreement.” (CP 8). Similarly, Paragraph 15a of the PSA states: “Buyer, at its option, may elect to waive the performance of any condition, contingency, or provision in Buyer’s favor set forth in this Agreement.” (CP 15).

In this case, Riverside did waive its right to close in two phases. Instead, Riverside informed Grand Ridge that it was ready and willing to close on all 20 lots shown in the recorded plat. (CP 182). Accordingly, the provisions in the PSA dealing with phased closing became immaterial. At the time of closing, there was no question what property Grand Ridge would be selling and Riverside would be buying: all 20 lots shown on the recorded plat.

F. RIVERSIDE IS ENTITLED TO RECOVER ITS ATTORNEY FEES IN THE TRIAL COURT AND IN THIS COURT UNDER THE ATTORNEY FEE PROVISION IN THE PSA.

Paragraph 21q of the PSA states that if either party brings any action arising out of the Agreement, "the prevailing party in any such action shall be entitled to an award of reasonable attorney fees and court costs incurred in such action or proceeding." (CP 18). Riverside was the prevailing party at the trial court, and the trial court's award of attorney fees pursuant to the Agreement should be affirmed. Further, under the Agreement Riverside is entitled to its attorney fees as the prevailing party on appeal.

IV. CONCLUSION

The Agreement between Grand Ridge and Riverside did contain a few mistakes and a number of addenda, and overall could have been "cleaner". However, none of the alleged problems with the agreement have any relevance in this appeal because Grand Ridge's primary challenge is based on the statute of frauds.

When attention is properly focused on the statute of frauds, there is no question that the PSA and Addendum 1 satisfy both exceptions to the rule that a legal description of the property be contained in purchase and sale agreements. The parties agreed that escrow could insert the correct legal description (after it was provided by Grand Ridge), and also specifically referenced the commitment to title insurance that did contain a

complete legal description of the property being conveyed. Grand Ridge cannot avoid application of either exception.

Similarly, Grand Ridge's notion that all agreements to develop and sell finished lots are void makes no sense. Grand Ridge has no authority for the argument that lots must be created before a purchase and sale agreement is executed and such a ruling would unnecessarily disrupt a well-settled procedure relied upon by real estate developers, home builders and construction lenders. More fundamentally, Grand Ridge has failed to recognize that a purchase and sale agreement conveys no present rights, and such an agreement can condition conveyance on any number of acts – including creation of the lots.

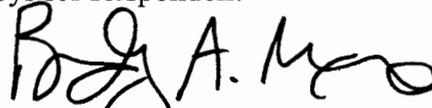
The statute of frauds argument is nothing but a pretext. Grand Ridge freely entered into a contractual arrangement, and then wanted to back out of the deal. Grand Ridge should not be allowed to wiggle out of its legal responsibilities.

Respondent Riverside Homes, Inc. respectfully requests that this Court affirm the trial court's grant of summary judgment, and award Riverside its reasonable costs and attorney fees incurred in the trial court and in this appeal.

Respectfully submitted this 11 day of January, 2008.

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP
Attorneys for Respondent

By: _____

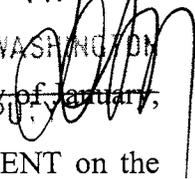


BRADLEY A. MAXA
WSBA No. 15198

08 JAN 11 PM 4:45

DECLARATION OF SERVICE

STATE OF WASHINGTON

I declare that I sent out for delivery on this 17th day of January,
DEPU: 

2008 a true and correct copy of the BRIEF OF RESPONDENT on the following at the address and in the manner described below:

U.S. MAIL

Bradley W. Andersen
Phillip J. Haberthur
Schwabe, Williamson & Wyatt, P.C.
700 Washington Street, Suite 701
Vancouver, WA 98660

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.


BETTY E. FRY