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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 43094-11 DEPUTY

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

OAKRIDGE HOMES II, LTD., a Washington corporation,
Appellant,

v.

FIRST CITIZENS BANK & TRUST COMPANY, a
Washington corporation,
Respondents,

REPLY BRIEF

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I.

ARGUMENT

**FIRST CITIZENS DOES NOT ADDRESS CONTRACTUAL
LANGUAGE REFERRING TO FEBRUARY 24, 2011
AGREEMENT THAT CONTAINS ACCURATE LEGAL
DESCRIPTION**

First Citizens Bank argues that Washington law is that if a real estate Purchase and Sale Agreement does not contain or include as an attachment to the agreement the complete legal description of the property being sold that the agreement is void under the statute of frauds. That is not, and has never been Washington law. All that Washington law requires to satisfy the statute of frauds is that the Purchase and Sale Agreement contain or refer to a document contains a sufficient legal description to locate the property without extrinsic evidence. *Bigelow v. Mood*, 56 Wn.2d 340, 353 P.2d 429 (1960). The bank does not deny that the counteroffer signed by the bank and by Oakridge Homes refers to the original offer of February 24, 2011 and incorporates the terms of that offer, including the complete legal description, into the counteroffer. Instead, the bank ignores Oakridge Homes' argument in its opening brief and Washington law that allows the statute of

frauds to be satisfied if a legal description of property purchased is contained in a document referred to in a Purchase and Sale Agreement. In the instant case, it is not disputed that the complete and accurate legal description of the property is contained in a document referred to the signed Purchase and Sale Agreement. The language in the signed contract that refers to the February 24, 2011 Real Estate Purchase and Sale Agreement that contains the full and accurate legal description states:

All terms and conditions of the offer (Real Estate Purchase and Sale Agreement) dated February 24, 2011, concerning Lots 22, 28 to 45 of Silver Creek Phase III (the Property") by Oakridge Homes II Limited, as Buyer and the undersigned First Citizens Bank as Seller are accepted except for the following changes. (CP 242).

That reference to the February 24, 2011 Real Estate Purchase and Sale Agreement that contains the accurate legal description is sufficient to satisfy the statute of frauds.

First Citizens Bank also does not explain why that same language that refers to and incorporates the February 24, 2011 offer does not make that offer part of the final contract.

Where parties incorporate by reference into a contract some other document, that document becomes part of the contract.

Satomi Owners Association v. Satomi, LLC, 167 Wn.2d 781, 225 P.3d 213 (2009). The fact that the February 24, 2011 offer from Oakridge was not part of the signed document does not matter. It is part of the contract because the agreement actually signed by the parties incorporates the February 24th offer. The statute of frauds is satisfied both because the Purchase and Sale Agreement refers to the February 24th offer that contains the correct legal description and because the language of the bank counteroffer incorporates the February 24th offer into the final contract. Either of those grounds is sufficient to satisfy the statute of frauds. For both reasons, the statute of frauds is satisfied.

**OAKRIDGE DOES NOT RELY ON STREET ADDRESS TO
SATISFY STATUTE OF FRAUDS**

In its third section of the brief, the bank argues that Oakridge attempts to rely on the street address of the property to satisfy the statute of frauds. It also argues that a street address that lacks the required block number and addition is insufficient to satisfy the statute of frauds. Oakridge Homes has not attempted to rely on the street address on the lots sold to satisfy the statute of frauds at any time in this case. The bank's argument is that because the legal

description of the property was inserted in the signed agreement where the blank form Purchase and Sale Agreement calls for the address of the property sold to be inserted that the legal description becomes an address rather than a legal description. No authority is cited for that proposition. The lots are described not by street address but as follows:

Lots 22, 28-45 of Silver Creek Phase III, Pierce County,
Washington 98375 (CP 243)

First Citizens argument that those words constitute the address for the property because they were inserted where the form calls for the property address is flatly wrong. It is a legal description, not an address.

The real issue regarding that language is whether or not that description is sufficient to locate the property without reference to extrinsic evidence. Both George Peters, a retired assistant vice president and vision underwriter for Chicago Title, Fidelity Title and Ticor Title, and Lyle Fox, a licensed surveyor, testified that they could locate the exact boundaries of each of the lots sold without any information other than that legal description. That testimony was unrebutted. As a matter of law if the description in the

counteroffer is sufficient to allow the land to be located without recourse to oral testimony or other extrinsic evidence it satisfies the statute of frauds. Bigelow v. Mood, *supra*, Bartlett v. Betlatch, 136 Wn.App 8, 146 P.3d 1235 (2006). Since it is undisputed that the exact boundaries of the property can be located from that legal description without reference to oral testimony, the statute of frauds is satisfied.

Without explaining how it is relevant to the argument, the bank argues that Mr. Peters “didn’t know if he could prepare an accurate legal description for the lots sold without using the title company plat records.” No authority is cited for why that is relevant. No authority supports an argument that a legal description contained in a Purchase and Sale Agreement must be sufficient to locate a parcel without reference to land title records. Whether or not Mr. Peters could prepare an accurate legal description for the lots without referring to records has no legal significance.

The bank also argues that Mr. Peters has never searched property locations by using county records rather than title company records. Whether Mr. Peters has ever gone to the county

records to review recorded plats or not is irrelevant. Since it is undisputed that title company records provide a sufficient method of locating the exact boundaries of the properties at issue, the requirements of *Bigelow, supra*, and *Bartlett, supra*, are met and the statute of frauds is satisfied.

The bank also argues that because the Silver Creek Phase III Plat that was originally recorded in 2005 was amended by a plat amendment recorded in 2006, that there may be confusion between the two plats so that the statute of frauds is not satisfied. No authority is cited for that proposition and it is meritless. The Declaration of George Peters that is unrebutted in the record is clear that at any point in time there is only one plat of Silver Creek Phase III. The original plat that was amended ceased to exist when the plat was amended. CP 175. The unrebutted testimony of Mr. Peters in the record is as follows:

It will also be noted that the reference to the plat of "Silver Creek Phase III" as of the dates of the Counteroffer are to the plat as it existed on that date according to the records of Pierce County – that is, it refers to the plat as it was amended by the plat alteration. There is no ambiguity about whether the named lots are as shown on the plat alteration of January 27, 2006. Any reference to the plat after January

27, 2006, refers to the plat alteration of Silver Creek Phase III. There is no discrepancy with respect to “versions” of the plat of Silver Creek Phase III, because on any given date that name reference is to only one unique plat. Prior to January 27, 2006, that name would refer to the original plat before it was amended, and after January 27, 2006, it refers to the same plat as it was amended – not to any other plat or land. No extrinsic evidence or document is needed to resolve any conflict or discrepancy, because none exist. There are not “two versions” of the plat. When a plat is amended the lots described in the amended plat supersede the lots described the old plat those lots described in the old plat cease to exist. (CP 175)

The bank’s argument that extrinsic evidence is necessary to resolve which of the two plats the Purchase and Sale Agreement is referring to is meritless because once amended in 2006, the original Silver Creek Phase III plat ceased to exist. The legal description in the 2011 Purchase and Sale Agreement can only apply to the 2006 amended plat since the 2005 plat ceased to exist when it was amended by the plat recorded in 2006.

The bank finally tries to argue that the legal description contained in the counteroffer addendum is insufficient because it doesn’t contain the block number for the lots purchased. That argument is meritless because Silver Creek Phase III does not

have block numbers. That is obvious from the legal description that the bank admits is the full and correct legal description of the property does not contain block numbers. CP 233. The reason for that is, as set forth by the Declaration of George Peters that Silver Creek Phase III does not have "blocks" within it because rather than using the same lot number in different blocks within the plat, Silver Creek Phase III has 262 lots, each of which has its own lot number so that block numbers are not necessary to distinguish between different properties. CP 174, 175. Mr. Peters' testimony was unrebutted that the lack of block numbers is irrelevant to determining which lots are being sold under the agreement.

TAX PARCEL NUMBER IS SUFFICIENT TO IDENTIFY EXACT LOT BOUNDARIES WITHOUT REFERENCE TO EXTRINSIC EVIDENCE

The bank tries to distinguish the holding in *Bingham v. Sherfey*, 38 Wn.2d 886, 234 P.2d 489 (1951) by stating that the tax legal description in that case contained the section, township and range in which the property is located. That fact is irrelevant to the Court's decision in *Bingham, supra*, and ignores the reason behind the ruling in the case. In *Bingham*, the court found that the tax parcel number was sufficient to satisfy the statute of frauds

because it allowed the exact dimensions of the property being purchased to be identified without extrinsic evidence. Both George Peters and Lyle Fox testified that the exact boundaries of the lots being sold can be determined from tax parcel numbers. CP 134, 175, 176. The reason that is the case is that each parcel in Pierce County has a unique tax parcel number. From that tax parcel number, one can locate the plat and the exact legal description of the property identified by parcel number. Whether or not the section, township and range is included in the tax parcel number is irrelevant. What matters is whether the tax parcel number gives enough information to locate the exact boundaries of the property being purchased without reference to extrinsic evidence. It is undisputed that the tax parcel numbers in this case do that. The inclusion of the tax parcel numbers in the Purchase and Sale Agreement satisfies the statute of frauds.

PART PERFORMANCE SATISFIES STATUTE OF FRAUDS

The bank attempts to distinguish the holding in *Dunbabin v. Allen Realty Company*, 26 Wn.App. 660, 613 P.2d 570 (1980) by stating that the facts of *Dunbabin* are different than the instant case. While the facts may be different, the holding of the case

applies directly to the facts in this case. In Dunbabin, the court held that where performance of a contract provides sufficient evidence to identify the property being purchased, the statute of frauds is satisfied. It is difficult to conceive of part performance that identifies the boundary of the property being purchased that is more accurate than the bank's execution of a deed at closing containing what the bank admits is the complete and correct legal description of the lots being sold. While the facts of this case may be different than the facts in Dunbabin, the bank does not argue that its execution of the deed failed to remove any ambiguity as to the property being sold by the bank to Oakridge. The parties performed this contract right down to executing closing documents and paying money into escrow for the closing. The only reason the sale did not close was because the bank's representative changed a closing statement by deleting from the closing statement the reduction to its proceeds for the school mitigation fees. Even if the statute of frauds had not been otherwise satisfied, the bank's acknowledgment that the legal description in the deed that it signed is accurate is sufficient part performance to satisfy the statute of frauds.

The bank also tries to factually distinguish Miller v. McCamish, 78 Wn.2d 821, 479 P.2d 919 (1971). That argument fails for exactly the same reason that the attempt to distinguish Dunbabin fails.

In Miller, supra, the court found that an oral agreement to purchase property satisfied the statute of frauds because the part performance proved what property was orally agreed to be sold. While the facts of this case that prove the description of the land sold are different than the facts in Miller, supra, they undeniably prove what property was sold by the bank to Oakridge under the Purchase and Sale Agreement. It is hard to imagine better part performance of a Purchase and Sale Agreement to prove the description of the property sold than the execution of a deed by the Seller asserting a statute of frauds defense containing a complete legal description of the property at closing. The part performance by the bank in signing that deed satisfies the statute of frauds.

Miller, supra, also holds that Washington courts will not allow the statute of frauds defense to be used to perpetrate a fraud. In the instant case, the bank is attempting to use a statute of frauds defense to perpetrate a fraud by using the defense to attempt to

avoid a valid Purchase and Sale Agreement. The part performance by the bank was sufficient to eliminate any ambiguity regarding the lots being sold. The statute of frauds is satisfied.

**CONDITION OF PROPERTY AND CONDITION OF TITLE
ARE NOT THE SAME THING**

The bank tries to argue that the waiver language contained in the addendum drafted by the bank that by its own clear terms applies to the physical and economic condition of the property applies to the physical or economic condition of the title to the property. The language included in the bank's addendum is clear. The language of the release waives claims that the Buyer has against the Seller:

"Arising out of the physical, environmental,
economic or legal condition of the Property."

The "Property" is described by the bank's addendum as the land itself. (CP 196). The bank's language about an indemnity related to the property by its own express terms applies to the physical land. Nothing in the addendum language addresses the condition of the title to the property which is not different than the condition of the land. Had the bank defined the property as including title when

it defined property for the purposes of the addendum. (CP 190). The bank's argument might have had merit. Since the property is defined by the contract as physical land, the bank's argument that the addendum applies to both defects in the title and physical defects to the property itself has no merit.

**WAIVER LANGUAGE DRAFTED BY THE BANK
APPLIES ONLY AT CLOSING**

The bank does not even respond to the argument of Oakridge in its initial brief that by its express terms the damage waiver is effective only upon closing. Again, the language of the release is:

Without limiting the foregoing, Buyer, upon Closing, shall be deemed to have waived, relinquished and released Seller from and against any and all matters arising out of latent or patent defects or physical conditions, violations of applicable laws, and any other acts, omissions, events, circumstances or matters effecting the Property.

The closing never occurred in this case. The language of the release drafted by the bank is clear. Since closing never occurred, the waiver never became effective. The bank's argument that the release language waives the bank's obligation to provide clear title at closing is without merit.

ELEMENTS OF MUTUAL ASSENT ARE MET

In its responsive brief, the bank argues that the Purchase and Sale Agreement that it prepared is so ambiguous that it is not enforceable. The first basis upon which the bank claims the document is ambiguous it argues that Oakridge demanded a \$3,005.00 deduction from the purchase price for the school mitigation fees at closing and later took the position it was entitled to another \$5,000.00 in deductions. (Respondent's brief, pg. 15). That argument is completely contrary to the facts that actually occurred. Oakridge approved and signed the closing statement prepared by the escrow agent showing no deductions from the purchase price for liens against the property other than the \$3,005.00 per lot school mitigation fee. (CP 26). Had the bank not modified the escrow documents, the closing would have occurred. The bank's argument that Oakridge later attempted to ask for an additional \$5,000.00 in reductions is factually unsupported and irrelevant because Oakridge had approved the closing statement, prepared by the escrow, without changes.

The bank next argues that the Purchase and Sale Agreement that it prepared is ambiguous as to what charges the

Seller is to pay at closing. In that argument the bank ignores that the school mitigation fees are monetary liens against the property. The lien shows up as an exception to title as Exception No. 14 to the Commitment for Title Insurance that is in the record. (CP 36). Both the February 24, 2011 offer and the Purchase and Sale Agreement prepared by the bank and signed by all parties state in Paragraph C:

Monetary encumbrances or liens not assumed by Buyer, shall be paid or discharged by Seller on or before closing.

(CP 225, 244).

It is not disputed that the monetary lien for the school district fee was not agreed to be assumed by Buyer anywhere in the agreement or any addendum. Both the February 24, 2011 offer and the final agreement signed by all parties states in Paragraph G and Paragraph 14 that any charges and assessments against the property to become due after closing are to be paid by the Seller at closing. Paragraph 14 states:

Charges and Assessments Due After Closing: prepaid in full by Seller at Closing. (CP 224, 243).

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Paragraph G of both agreements states:

Charges levied before Closing, but becoming due after Closing shall be paid as agreed in Specific Term No. 14. (CP 226, 245).

Both because the school mitigation fees are liens against the property to be paid by Seller under Paragraph C of the agreement and because the language of Paragraph 14 and Paragraph G requires charges and assessments due after closing to be paid by the Seller, the agreement unequivocally requires the Seller to pay those expenses at closing. That is why the escrow officer who prepared the closing statements placed the obligation on the Seller. While the bank makes the argumentative assertion that the agreement does not define when encumbrances levied or the term charge or assessment, no alternate explanation of what those paragraphs mean has been provided by First Citizens Bank. The clear language of the Purchase and Sale Agreement that requires monetary encumbrances or liens to be paid by the Seller at closing governs the result in this case. The Seller was obligated to pay the school mitigation fees at closing.

The bank next argues that the feasibility contingency language requires the Buyer to investigate before sale somehow

makes the school mitigation fees the Buyer's obligation. The language of the feasibility study requires the Buyer to investigate the property regarding:

Special building requirements, including setbacks, height limits or restrictions on where building may be constructed on the property; whether the property is affected by a flood zone, wetlands, shorelands, or other environmentally sensitive area; road, school, fire and any other growth mitigation or impact fees that must be paid; the procedure and length of time necessary to obtain plat approval and/or building permit, sufficient water, sewer and utility and other service connection charges, and all other charges that must be paid.

It is difficult to understand how the bank believes that the feasibility language obligated the Buyer to pay school mitigation fees that are a lien against the property that the Seller is expressly obligated to pay under the agreement at closing. Nothing in that language apportions any of those expenses between the parties. Without citing any authority, the bank argues that it subjectively believed that those expenses would have to be paid by Oakridge. The bank's subjective belief about the meaning of the contract is irrelevant because Washington follows the objective manifestation tests for contracts. Keystone Land and Development Company v.

Xerox, 152 Wn.2d 171, 94 P.3d 945 (2004). Under Washington law, the Court is required to review the terms of the contract and determine what a reasonable person would believe they mean. Alexander v. Wohlman, 19 Wn.App 670, 578 P.2d 530 (1978). The bank's subjective belief about the contract is irrelevant.

For the first time on appeal the bank tries to argue that the mitigation agreement should have cost the bank only \$650.00 per lot rather than \$3,005.00 per lot. That argument was not addressed below and should not be heard on appeal. RAP 2.5. Further, the mitigation agreement expressly provides in Paragraph 3(b) that the \$650.00 fee is subject to adjustment by municipal ordinance. (CP 116). The mitigation fee is \$3,005.00 because it was adjusted in accordance with the mitigation agreement that is recorded and provided notice that the mitigation fees could be changed. It is not contested that \$3,005.00 is the correct mitigation fee in 2011. The fees were to be paid by the bank by the express terms of the agreement.

Finally, the bank attempts to argue for the first time on appeal that the school mitigation agreement does not refer to Silver Creek Phase III and has no legal description which would make it

an encumbrance on the lots being sold by the bank to Oakridge. That argument was not raised by the bank below, but Oakridge anticipated that the bank might attempt that argument in a rebuttal memorandum and placed evidence in the record that is undisputed that the school mitigation agreement binds the lots sold by the Seller. (CP 272 – 290). In his declaration of October 30, 2011, George Peters gave three reasons that the school mitigation agreement bound the subject property. (CP 273-274). The third reason given is that at least two recorded deeds in the chain of title to the lots being purchased by Oakridge in this case, both of which are attached to his declaration, each encumbered the property transferred, with the school mitigation fees by stating title is “subject to” the school mitigation agreement. Washington law provides that the language “subject to” with encumbrances listed after it in a deed is sufficient to encumber the property with the exceptions that it is sold “subject to”. *Beebe v. Swerda*, 58 Wn.App. 375, 793 P.2d 442 (1990), *Schafer v. Board of Trustees*, 76 Wn.App. 267, 883 P.2d 1387 (1994). There is no legal basis for the bank to claim that the property is not encumbered by the school mitigation agreement.

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CONCLUSION

This Court should:

1. Reverse the trial court and hold that the Purchase and Sale Agreement satisfies the statute of frauds;
2. Hold that the Purchase and Sale Agreement requires the bank to pay the school mitigation fee;
3. Rule that the bank breached the Purchase and Sale Agreement by altering the closing documents and refusing to pay the school mitigation fee at closing; and,
4. Reverse the award of attorneys' fees to the bank and award attorneys' fees to Oakridge Homes.

RESPECTFULLY SUBMITTED this 11 day of July, 2012.

By



BART L. ADAMS, WSBA #11297
Attorney for Appellant

NO. 43030-4-II

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AFFIDAVIT OF MAILING

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STATE OF WASHINGTON)
) ss.
County of Pierce)

The undersigned, being first duly sworn on oath,
deposes and states:

That I am a citizen of the United States; over legal age; not a party to this proceeding; competent to be a witness herein; that on the 11th day of July, 2012, I mailed a true and correct copy of Appellant Oakridge Homes II, LTD's Reply Brief, which is identical to the original thereof, which are on file with the Clerk of this Court addressed to:

Robert G. Casey
Attorney at Law
1201 Pacific Avenue, Suite 1200
Tacoma, Washington 98402-4395

That the same was deposited into the United States mail in a sealed envelope, with correct postage affixed, by first class mail.


JEANNE GLEIM

SUBSCRIBED AND SWORN to before me this 11th day of July, 2012.


NOTARY PUBLIC in and for the
State of Washington,
Residing at Fox Island, WA.
My Commission Expires, 11-15-12