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Appeal No. 52000-1-II  
Pierce County Superior Court No. 18-2-04512-1

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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NORTHWOOD ESTATE, LLC,

Respondent,

v.

LENNAR NORTHWEST, INC.,

Appellant.

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BRIEF OF RESPONDENT

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COMES NOW the Respondent, Northwood Estate, LLC, (“Northwood”) by and through their attorney Martin Burns of Burns Law, PLLC, and submits their Brief of Respondent to the Court of Appeals as follows:

## I. INTRODUCTION

This is a case where a developer, Northwood, sold a 33 lot plat to Appellant Lennar. As part of the deal and by way of an amendment for post-closing plat modification, Northwood agreed to convert eight lots into 13 lots. There has been no dispute that Northwood expended over \$260,000 and 750 hours getting the modification complete.

Northwood turned the plat modification into the City of Edgewood on November 13, 2017, prior to the contractual timeline. The City informed Northwood that due to the holidays, it was not going to seek formal plat modification by the city council until January. The December 1, 2017 deadline passed. On December 11, 2017 the City of Edgewood came back with two required changes. One was to substitute in Lennar as the applicant as it had demanded that by way of a letter to Edgewood. The second was a stylistic matter of removing buffer lines which were not even improper under the Edgewood Municipal code.

On January 25, 2018, the modified plat was recorded and the eight lots became 13 lots. The contract provided that Lennar would pay Northwood \$765,000 for converting the eight lots to 13 lots. Because of the slight delay, for which Lennar has attributed no damages, it has refused to pay the \$765,000 and it has retained the five additional lots. Northwood has

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agreed to reduce its claims by any damages for the brief delay related to Edgewood not processing the modification. Lennar has refused seeking to pay nothing for the benefit conferred by Northwood's approximate \$260,000 expenditure and 750 hours of effort.

On reconsideration, Judge Blinn changed an earlier decision and essentially ruled completely in favor of Northwood. Lennar faults such reconsideration. The question for this appeal really is: In the end, was Judge Blinn's decision an abuse of discretion under existing law? It was not.

## **II. RESPONSE TO ASSIGNMENT OF ERROR**

1. The trial court properly interpreted the Agreement provisions as a covenant as opposed to condition precedent based on the contract language.
2. The trial court properly interpreted the Agreement provision as a covenant as opposed to a condition precedent as interpreting the provision as a condition precedent would effectuate a forfeiture.
3. The trial court could be affirmed on an alternate ground that even if it did interpret the Agreement provisions as a condition precedent, it would be an appropriate exercise of its discretion to not enforce such condition in a manner that would effectuate a forfeiture.
4. Further, even if there was an enforceable condition precedent, then the trial court could have allowed the equitable claims to move forward.

### **III. RESPONSE TO STATEMENT OF THE CASE**

1. Should the trial court have interpreted the relevant Agreement provisions as a condition precedent when the Agreement language show it to be a covenant and to so interpret it as a condition would effectuate a massive forfeiture to Northwood when there is no corresponding damage claimed by Lennar?
2. Should a condition precedent be enforced if it would effectuate a massive forfeiture to Northwood and when the alleged failure thereof caused no damage to Lennar?
3. Even if the court were to dismiss the contractual claims, should the equitable claims be reinstated?

### **IV. RESPONSE STATEMENT OF FACTS**

#### **a. Procedural History:**

On January 8, 2018 Northwood filed a complaint for breach of contract, anticipatory breach and unjust enrichment seeking contractual damages as well as, alternatively, an award based upon disgorgement, quantum meruit and unjust enrichment. CP 1-5. The parties filed counter-summary judgments which were heard on March 30, 2018 at which time the court dismissed Northwood's contract claim but left the quantum meruit claim. CP 135-136. Both parties filed for reconsideration. CP 137-192. On May 18, 2018 the trial court granted reconsideration and thereafter reinstated the contract claim, dismissed the quantum

meruit/unjust enrichment claims<sup>1</sup> and limited the remaining issue for trial as being the offset damages caused by the delay. CP 193-194. Lennar thereafter filed a motion for discretionary review and review was granted on September 11, 2018 by Court of Appeals Commissioner Eric B. Schmidt.

**b. Factual History:**

In December of 2015, Northwood executed a Purchase and Sale Agreement (“PSA”) with Lennar to sell the residential real property known as Lots 1 through 33 of Northwood Estates in the City of Edgewood, Pierce County, Washington. CP 15-16.

The Agreement provided for an additional seven hundred sixty-five thousand dollars (\$765,000.00) to be paid to Northwood for completion of a Plat Modification as described in sections 1.2 and 2.3, et seq., of the Contract. CP 15-18. The Plat Modification would convert the Northwood West Plat Phase I’s 8 existing lots into 13 total lots, effectively giving Lennar 5 more lots. CP 15, 17-18. By addendum, such conversion was to be done by December 1, 2017. CP 38-40. (Such purchase and sale with addendums are referred to herein as the “Agreement”)

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<sup>1</sup> For the record, Northwood believes that the quantum meruit claim is appropriate but acknowledges to this court (as it did to the trial court prior to reconsideration) that it is an alternate theory for recovery and would not coexist with a breach of contract claim. To the extent any court were to rule that a contractual duty never arose because of a failure of a condition precedent, then recovery in quantum meruit would be proper. This is briefed in V.d. below.

The original 33-lot plat for Northwood Estates was recorded on November 1, 2016. CP 57.

On or about December 8, 2016, Northwood conveyed the Subject Property to Lennar pursuant to the Agreement. CP 57.

Northwood submitted the final Plat Modification documents to the City of Edgewood (“City”) on November 13, 2017, just after the appeal window closed and 18 days before the December 1, 2017, deadline in the Agreement, as amended. CP 57. Singh had no control over Edgewood’s handling of such submission. CP 57. Mr. Singh testified that he never intended that he was assuming the risk of losing any and all compensation if the plat modifications were not approved by the deadline. Id. at 133.

After submission of the final Plat Modification documents, City representatives stated that the Plat Modification would be reviewed on the City Council’s January 9, 2018, agenda and could not be heard earlier due to delays related to holiday schedules. CP 57-58. The City of Edgewood had only two requested changes. CP 116. The first was that “the final plat does not need to contain the buffer lines on the individual lot.” Id. The second was to remove a Northwood signor as Lennar was taking over. Id. Singh testified how the buffers were not improper under Edgewood Municipal Code section 16.04.130(E)(18) (which are the final plat requirements) as the code allows inclusion of “Any restrictions... as required by the preliminary approval, local and state regulations, or at the discretion of the property owner.” CP 134.

Lennar, through its counsel, sent a letter to Mr. Singh dated December 4, 2017, in which it stated that it would not pay the additional \$765,000 because the Plat Modification had not yet been recorded. CP 58, 89. Lennar also demanded that Northwood relinquish to it the application status along with all entitlements, development rights, and permits related thereto. Id. It should be noted that Lennar was claiming a condition precedent and that no contract obligations arose yet demanded Northwood perform such agreement by turning over documents and information. Id.

Northwood, through counsel, responded with a letter dated December 7, 2017, in which it explained that all of its obligations on the Plat Modification had been performed and only action by the City remained for recording of the Plat Modification. CP 58, 91-93. The Northwood letter further explained that Lennar was attempting to obtain a forfeiture of \$765,000 under the Agreement which would constitute an unjust enrichment and cited legal authorities in support. Id. Northwood also communicated that the delay was only due to waiting for the action of City of Edgewood officials and that this delay would, at most, constitute a minor breach of the Agreement which did not justify withholding the entire sum of \$765,000. Id. Northwood acknowledged that the delay could possibly justify an offset of damages that Lennar suffered as a result, if any could be proven, and invited Lennar to demonstrate such. Id. Northwood informed Lennar that Lennar's demand and representation of intent not to pay was a major anticipatory breach of the Agreement and

would be treated as such unless Lennar soon communicated a change in its position. Id.

Lennar, through its counsel, responded to the December 7, 2017, letter with a letter dated December 14, 2017, in which Lennar confirmed its position, summarily dismissed the points and authorities raised by Northwood's counsel, and insisted that it would not pay Seller any of the agreed \$765,000. CP 59, 95. The Plat Modification was recorded on January 25, 2018. CP 59.

Northwood never received from Lennar a 10-day notice of default and opportunity to cure regarding the Plat Modification. CP 59. Such notice is provided for in the Purchase and Sale Contract Section 7.1. CP 29.

Northwood has spent approximately \$260,000 in doing the plat revisions which includes, without limitation, engineering, surveying, excavation so as to add and move utility stubs, reworking curbing and gutters as well as driveway approaches. Such amounts also include fees to the City for permits, review, and inspections. CP 59.

Northwood estimates that its principals have spent roughly 750 hours in modifying the plat. Id. Mr. Satwant Singh, the primary member of Northwood, testified that his time as a developer is quite valuable and such efforts have detracted from and reduced time that he could spend on other projects. Id.

Northwood's principal Satwant Singh, testified that any delay caused was very minimal. CP 59. In viewing Lennar's construction that is already ongoing at the larger plat, not all of the previously sold lots

(excluding the eight lots Northwood re-platted to thirteen) were being built upon. Id. Accordingly, the delay of the final approval of the Plat Modification did not, from Satwant Singh's observation, leave Lennar without lots to build on. Id. This was not rebutted by Lennar. Nor did Lennar set forth any damages flowing from such delay.

Satwant Singh also looked in the County records for any recorded liens on the subject property such as a construction loan deed of trust and has found none. CP 60. Mr. Singh alleged that Lennar did not have any hard carrying costs on this plat, the reduction of which might have been delayed by the delay in the Plat Modification recording. Id. CP 60.

## V. ARGUMENT

### a. Standard on appeal:

Appellant correctly cites existing law as it relates to the review of a summary judgment as being a de novo appeal. However, this case is a bit more complicated as the trial court had the choice between several different proper roads to recovery. The trial court decided that it would not construe the contract provisions as a condition precedent as it would cause a massive forfeiture. It could also have ruled (1) that, by its terms, it was not a condition precedent in the first place; (2) that condition precedents are not enforced when it would effectuate a forfeiture; or (3) that the equitable claims could proceed. Accordingly the trial court was

faced with four possible, but somewhat inconsistent, paths to generally the same recovery.

In looking at the path that the trial court eventually ruled upon reconsideration - that the clause at issue would not be interpreted as a condition precedent as such interpretation would effectuate a forfeiture - that is more than a simple matter of law. This creates two other decisions that would be reviewed under the “abuse of discretion” standard: First, that there would be a forfeiture. The determination of the existence or nonexistence of an inequitable forfeiture is reviewed under an abuse of discretion standard. Heckman Motors, Inc. v. Gunn, 73 Wn. App. 84, 88, 867 P.2d 683, 685 (1994). Second, that the equity would prohibit such an interpretation which would cause a forfeiture. As will be more fully discussed below, there is ample case law of courts equitably refusing to interpret and/or enforce condition precedents that effectuate a forfeiture. The case law related to condition precedents is heavily laced with lease and purchase extension/options wherein decisions are clear as to a trial court’s power to exercise equity to avoid forfeitures. “We review the application of equity for an abuse of discretion. *Willener v. Sweeting*, 107 Wash.2d 388, 397, 730 P.2d 45 (1986); *Wilhelm v. Beyersdorf*, 100 Wash.App. 836, 848, 999 P.2d 54 (2000).” Mendez v. Palm Harbor

Homes, Inc., 111 Wn. App. 446, 460, 45 P.3d 594, 602–03 (2002), as amended (June 6, 2002).

Judge Blinn explicitly engaged in equitable considerations in viewing if the situation was an inequitable forfeiture. 6/6/68 RP p. 15-16. He therefore refused to interpret the contract as a condition precedent so as to avoid such result. Id. “A trial court has discretion to decide whether equity requires an equitable grace period. This discretion is to be exercised in light of the particular case's facts and circumstances. Because the trial court has broad discretionary authority to fashion equitable remedies, such remedies are reviewed for an abuse of discretion. An abuse of discretion occurs when the trial court's decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons.” (footnotes omitted) Recreational Equip., Inc. v. World Wrapps Nw., Inc., 165 Wn. App. 553, 559, 266 P.3d 924, 927–28 (2011); See also, Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship, 158 Wn. App. 203, 221, 242 P.3d 1, 11 (2010).

Accordingly, while the Appellant is correct that the strict determination of whether the provision is a covenant versus a condition as being a matter of law reviewed under a de novo standard, the trial court's determination that such interpretation would create an impermissible forfeiture is a matter of equity. Further, it is noted that Judge Blinn could

have got to the same point by stating that the even if he did treat the clause as a condition precedent, he could have determined that equity would prohibit its enforcement nonetheless. This court “may affirm a trial court on any theory supported by the record and the legal authorities even if the trial court did not consider or mainly consider such grounds. *LaMon v. Butler*, 112 Wash.2d 193, 200–01, 770 P.2d 1027 (1989); *Wendle v. Farrow*, 102 Wash.2d 380, 382, 686 P.2d 480 (1984).” *Mendez v. Palm Harbor Homes, Inc.*, at 460–61. Judge Blinn was well within his discretion in making his ruling in this case.

**b. The trial court did not err in ruling that the operative portions of the Agreement and its amendments at issue are not properly classified as a condition precedent.**

While the Respondent agrees with the ultimate decision of the trial court that the agreement provisions, however classified, should not be enforced as it would effectuate a forfeiture, there is a major flaw with the notion that the Agreement terms are a condition precedent. The problem is that the Agreement provisions at issue are tied to default provisions. Default provisions derive from breaches of a contract. There is no need to have breach provisions for condition precedents as, by definition, such terms precede an obligation.

This court should also note that the provisions at issue are part in parcel of a larger purchase and sale agreement which was performed. This

situation is different from all other condition precedent cases, as in this case, Lennar, if successful, walks away with everything. In other condition precedent cases, if the condition is not met, the parties separate and each walks away with what they were walking in with. For example, in Salvo v. Thatcher, 128 Wn. App. 579, 585-6, 116 P.3d 1019 (2005), an earnest money case wherein Division 1 reversed the trial court, a condition precedent to closing – financing – was not met. The court separated the parties and the buyer got their earnest money back and the seller walked away with his property. Id. at 587. In this case, Lennar would walk away with the five extra lots and Northwood would not only not get its \$765,000, it would suffer a loss of about \$260,000 on funds expended doing the plat modifications and 750 hours of effort. CP 59. This case is different in that value has been added to Lennar's plat and it would be unjust that Lennar retain such benefit without compensation.

The most comparable case in such regards is Jones Associates, Inc. v. Eastside Properties, Inc., 41 Wn. App. 462, 704 P.2d 681 (1985). In such case an engineering firm, Jones, performed professional services for Eastside but was not paid for \$15,030 plus interest. Id. at 463. The trial court had dismissed the case related to a condition precedent not being met, that being county approval of the short plat. Id. at 464-5. The Court of Appeals refused to allow Eastside to effectuate a forfeiture and take the

benefit of Jones' work citing to how conditions precedents are disfavored, that Jones did not control the county's approval process and how "forfeitures are not favored and are never enforced in equity unless the right thereto is so clear as to permit of no denial." (citations omitted) Id. at 468-470. Jones will be further discussed below but it is illustrative as to how the courts do not let parties take the benefit of the money and efforts of others under the guise of conditions precedents. This court should be mindful of how this present case is different from many other "condition precedent" case when reviewing the ruling of Judge Blinn and his determination to not construe it as a condition precedent.

**(1) The language of the Agreement is a contractual covenant susceptible to breach as opposed to a condition precedent.**

This court should look closely at the actual Agreement language that is being urged to be construed as a condition precedent as opposed to a contract covenant. The provision itself has default language. The Agreement itself spells out what happens in a default.

Purchase and Sale Agreement Section 1.2 provides in pertinent part:

...if the plat modification (defined below in Section 2.3) has recorded not later than one (1) year following the closing the "Plat Modification Deadline"), the number of Lots will increase by five (5) and buyer shall pay seller an additional Seven Hundred Sixty-Five Thousand and No/100 Dollars within fifteen (15) days of notice to Buyer of the Plat Modification to reflect the increase in number of Lots....

CP 15. The Second Amendment to such Purchase and Sale Agreement, Section 1, which explicitly only replaces the aforementioned purchase and sale agreement Section 1.2, reads:

Plat Modification. The Plat Modification Deadline shall be changed to December 1, 2017, the Seller shall have no right to extend the Plate Modification Deadline. Accordingly, the last sentence of Section 1.2 of the Agreement, which reads “If the Plat Modification has not recorded by the Plat Modification Deadline, Seller shall have the right to extend the date of the Plat Modification Deadline one (1) time for up to Three (3) months upon notice to Buyer not later than eleven (11) months following the closing” is hereby deleted in its entirety. If the plat modification (defined below in Section 2.3) has recorded not later than one (1) year following the closing the “Plat Modification Deadline”), the number of Lots will increase by five (5) and buyer shall pay seller an additional Seven Hundred Sixty-Five Thousand and No/100 Dollars within fifteen (15) days of notice to Buyer of the Plat Modification to reflect the increase in number of Lots. If Seller does not obtain the Plat Modification by the Plat Modification Deadline, Seller shall assign and turn over to Buyer Seller’s applicant status to the Plat Modification and all other entitlements, development rights, and permits related thereto.

CP 38. It should be noted that nothing in such provision says that the Seller will receive nothing if the modification is not done in time. Such provision is contrary to normal notions of condition precedent as it provides for what might be labeled “post-breach obligations” of the Seller in that Northwood would have to turn over rights and permits to Lennar. Normally in condition precedents, no obligations arises. This provision has continuing obligation and in such sense, it is contractual in nature as

opposed a condition precedent. Further, as Judge Blinn noted, nothing in such provision set forth what would happen next. 3/30/18 RP p.29 ln. 9-12. However, as explained below, that is not exactly correct. Still, if the contract is followed, we end up at almost the same spot as where Judge Blinn ended up: The \$765,000 is reduced by any damages caused by the delay. Frankly, by strictly following the Agreement, there would be no breach as Lennar never gave required notices. Besides, Lennar does not claim to have damages.

In viewing the Agreement as a whole, it is not enough to only read Section 1 of the Second Amendment. Section 5 of the Second Amendment provides that “Except as expressly amended hereby, the Agreement is confirmed and remains in full force and effect.” CP 39. The “Agreement” is, per Recital B of the Second Amendment; (1) the original purchase and sale agreement; (2) the first amendment which is not relevant to this appeal; and (3) the Second Amendment. CP 38. The point being, while Section 1 of the Second Amendment “expressly amended” one sentence and added obligations after the deadline passed, Section 5 left the rest of the contract in place. CP 38-39. It is appropriate to analyze such contract as a whole. The original Purchase and Sale Agreement spells out what happens in a situation when finished lots are not obtained by a deadline.

Contract Section 2.3 sets forth in pertinent part:

The Property and the Lots on the property shall be finished as provided in this Section 2.3. If Seller is unable to obtain Finished Lots as provided herein prior to Closing, but not later than June 30, 2016, **then Seller shall be in Default** (as defined below in Section 7.1)....

(Emphasis added) CP 18. Recall the Second Amendment changed to June 30, 2016 date to December 1, 2017. CP 30. It should also be noted that the Agreement Section 2.3 is the provision that originally discussed the arrangement to “modify lots 16 through 23 to become single-family residential lots 16RP through 27RP and 28....” CP 18. That is the exact term that provides for the conversion of 8 lots to 13 lots. It discusses if the modification does not occur that “Seller shall be in default.” “Default” is a term related to contract covenants – not condition precedents. In Tacoma Northpark, LLC v. NW, LLC, 123 Wn. App. 73, 79, 96 P.3d 454, 457 (2004), the court discussed condition precedents must exist or occur “before there is a breach of contract duty....” Parties can breach contract covenants and be subject to damages. Parties cannot “breach” condition precedents and be subject to damages – they either perform them or they don’t. The fact this contract has “default” terms and remedies related to the failure to meet the deadline mandates the conclusion that the terms at issue are actually contractual covenants (promises) as opposed to conditions precedents. As the above quoted Agreement Section 2.3 cites

to Section 7.1, this court should consider how the agreement actually handles defaults:

7.1 Default. The failure of either party to perform any act to be performed by each party or to refrain from performing any act prohibited hereby shall be a “Default” by such party if such failure continues for ten (10) days after written notice by the non-defaulting party.

CP 29. Clearly the completion of the plat modification was “any act to be performed by each party”. The contract then goes on to discuss remedies of such a default:

7.2.2 Default by Seller. Upon the occurrence of any Default by Seller, Buyer may seek any of the following remedies: (i) Buyer shall be entitled to file an action for damages actually suffered by Buyer by reason of Seller’s Default (including, but not limited to, attorneys’ fees, engineering fees, fees of environmental consultants, appraisers’ fees and accountants’ fees incurred by Buyer in connection with this Agreement and any action hereunder); (ii) seek specific performance of the Seller’s obligations hereunder and Buyer shall be entitled to recover from Seller its reasonable attorneys’ fees and costs associated with such action; or (iii) terminate this Agreement and receive a return of the Deposit and the parties shall thereupon be released from all further obligations hereunder, except those which are expressly stated to survive termination. In the event the court refuses to award Buyer specific performance because the Seller has engaged in an act which has the effect of making it impossible for the court to award specific performance. Buyer shall also be entitled to all damages allowable under applicable law.

CP 29-30.

When determining the intent of the parties to the Agreement, the court reads the contract as a whole. Mayer v. Pierce Cty. Med. Bureau, Inc., 80 Wn. App. 416, 420, 909 P.2d 1323, 1326 (1995). The contract and its amendments, read as a whole, establish what should happen in this case. The violation of deadline should be seen a failure to perform under Section 7.1. That would give rise to a 10 day notice and an opportunity to cure before such nonperformance was a “default”. However, it is also unrebutted in this case that Lennar never declared Northwood in Default by providing the 10 day notice and opportunity to cure. CP 59. Courts hold parties to the notice of default procedures provided in their contracts. Clausing v. DeHart, 83 Wn.2d 70, 79, 515 P.2d 982, 987 (1973) (“The subsequent procedure employed to give notice of forfeiture was not provided for in the contract of the parties and was, therefore, of no effect.”). Failure to give required notices can be fatal to lawsuits. Hous. Auth. of City of Seattle v. Silva, 94 Wn. App. 731, 734, 972 P.2d 952, 954 (1999). In Republic Investment Company v. Naches Hotel Company, 190 Wash. 176, 67 P.2d 858 (1937) the Court held that a cause of action to terminate a lease would not occur until contractual notice provisions were complied with. In Gray v. Gregory, 36 Wn.2d 416, 417, 218 P.2d 307 (1950), the Court again said there could not be a claim for forfeiture without compliance with the contractual notice-cure provisions and said

all parts of the contract must be construed together and effect given to each part. In DC Farms, LLC v. Conagra Foods Lamb Weston, Inc., 179 Wn.App. 205, 226, 317 P.3d 543 (2014), the court held: “A party who has bargained for a notice-and-cure provision to protect against forfeiture and litigation is entitled to have that bargained-for protection honored.” Northwood never, technically, was in breach. As such, the remedies of section 7.2.2 never are implemented. We have a failure to perform – not a breach and not a default – and subsequent completion rendering the issue moot and no damages. Northwood should get its \$765,000.

The above analysis is consistent not only with how case law treats questions as to condition precedents, it is consistent with authority related to such situations when a forfeiture would occur. Most importantly, it is what the parties agreed to.

If a court had any concerns if a provision is to be labeled a condition precedent or a covenant, it is to be deemed a covenant. “Where it is doubtful whether words create a ‘promise’ or an ‘express condition,’ they are interpreted as creating a ‘promise.’ Restatement, Contracts § 261, p. 375; 5 Williston, Contracts (3d ed.) § 665, p. 133.” Ross v. Harding, 64 Wn.2d 231, 236, 391 P.2d 526, 531 (1964).

As mentioned, Jones Associates, Inc. v. Eastside Properties, Inc. was a case wherein a condition precedent was urged by the recipient of services

to avoid payment. In reaching the contrary conclusion, the court first noted that the relevant provision did “not expressly indicate that if King County approval was not obtained, Eastside would not be responsible for any costs whatsoever....” Id. at 467. The court stated:

An examination of the entire contract, the circumstances of its formation, the parties' conduct and the reasonableness of their interpretations supports the conclusion that obtaining King County final plat approval was intended to be Jones Associates' duty under the contract but not a condition precedent to payment.

Id. at 470. The same is true here. There is no language in the contract or amendments to support a forfeiture of \$765,000. Judge Blinn expressly discussed this in his initial decision where he said “I think the contract is silent in terms of laying out explicitly what happens if the modification is recorded but recorded late.” 3/30/18 RP p. 29 ln. 9-12. Again, the above analysis actually shows how the contract does address a failure to perform. Jones also listed out words that are common in condition precedents. Such words are “as” “provided that,” “on condition,” “when,” “so that,” “while,” “as soon as,” and “after.” Jones at 467. Lennar’s claimed condition precedent does not use any of these words. The Agreement uses “if” which is a term that could just as easily be written into a promise breach provision as opposed to being a condition precedent. In fact, the Agreement ties the word “if” to the default provision: “If Seller is unable

to obtain Finished Lots as provided herein prior to Closing, but not later than June 30, 2016, **then Seller shall be in Default** (as defined below in Section 7.1)....” (emphasis added) CP 18.

Strictly construing the language of Section 1 of the Second Amendment to Purchase and Sale Agreement against Defendant necessarily leads to the conclusion that the December 1, 2017, deadline is a covenant and not a condition precedent. Section 1 of the Second Amendment is not explicit as to being a condition precedent and such an interpretation of a condition precedent is not favored in any event and certainly should not be so construed if it effectuates a massive forfeiture.

There is no need to effectuate a forfeiture. There was a clear contractual remedy had Lennar sent the 10 day notice. Of the Section 7.2.2 remedies, “termination” is now moot, “specific performance” is moot but the right to “damages” remained. This is the same result as in Jones at 471 where the court held: “However, since it is undisputed that King County approval was not secured, Jones Associates may be liable for breach of its promise to obtain King County final plat approval.” Given the lack of the 10 day notice, such remedy is not implicated as the situation is already cured. Judge Blinn’s ruling is more actually more advantageous to Lennar than a strict reading of the whole agreement. Given the failure to give such notice and Lennar’s admission it is not

claiming damages, the proper result is to remand with instructions to enter the \$765,000 judgment for Northwood.

Lennar argues in its Opening Brief at page 14, that there is a “material breach”. In doing so Lennar cites to 224 Westlake, LLC v. Engstrom Properties, LLC, 169 Wn. App. 700, 724, 281 P.3d 693, 707 (2012) (citations and internal quotations omitted) to state “a material breach is one serious enough to justify the other party in abandoning the contract ... one that substantially defeats the purpose of the contract.” 224 Westlake, LLC v. Engstrom Properties, LLC, 169 Wn. App. 700, 724, 281 P.3d 693, 707 (2012). However, Lennar did not abandon the contract and the purpose of this contract was not defeated. Lennar took the assignment of rights and did exceedingly minimal changes to the plat (removing buffer lines) and took the benefit of the contract. For such reason it could not be considered a material breach. Another reason it cannot even be considered a default of the contract (material or otherwise) is that Lennar never even gave a 10 day notice and opportunity to cure required by Section 7.1 of the Agreement.

Still, this is not a material breach. Case law excuses minor and unimportant deviations. In a recent case where the court did not find substantial performance, it laid out the test that clearly applies in this case:

The doctrine of substantial performance is intended for the protection and relief of those who have faithfully endeavored to perform their contractual obligations in all material and substantial particulars, so that their contractual rights may not be forfeited because of “mere technical inadvertent or unimportant omissions or defects.” Donald W. Lyle, Inc. v. Heidner & Co., 45 Wn.2d 806, 812, 278 P.2d 650 (1954). The doctrine applies only in rare instances where only “minor and relatively unimportant deviations” remain to accomplish full contractual performance. Taylor v. Shigaki, 84 Wn. App. 723, 729, 930 P.2d 340 (1997) (quoting 17A Am. Jur. 2d Contracts, § 634 (1991) ).

Howard v. Ocwen Loan Servicing, LLC, 75593-5-I, 2018 WL 1152012, at \*5 (Wash. Ct. App. Mar. 5, 2018) (cited under GR 14.1). In the present case the only “defects” in the plat submission were (1) a stylistic inclusion of buffer lines that did not even violate Edgewood City Code and (2) the failure to anticipate that the City would not process the modification until after the holiday. Neither issue caused any damage claimed by Lennar. This is nowhere near a material breach.

**(2) The trial court was correct to not interpret the Agreement in a manner that would effectuate an inequitable forfeiture.**

Judge Blinn clearly was dealing with a forfeiture situation. The case law cited by Lennar supports Judge Blinn exercising equitable considerations. Judge Blinn discussed his reasoning:

Again, the harsh forfeiture is 765,000 when Northwood has expended several hundred thousand to do the work and Lennar gets the benefit, and I think that’s a harsh forfeiture in which case I think this court is forced to construe the contract or attempt to construe the contract in a way where it is not a condition precedent, and I think that’s where I’m

left, and so I think in light of the convincing argument that quantum meruit and unjust enrichment aren't available, it results in a harsh forfeiture, and I'm to construe it in a manner that is not a condition precedent so as to avoid that harsh forfeiture....

6/6/18 RP at p. 15 ln. 17 to p.6 p.16 ln 3. Frankly, Judge Blinn had two choices. First, he could have construed the contractual terms as a covenant which could be breached leading to a damage offset, as he did. This is consistent with binding precedent. Division 2, when faced with a term that arguably created a forfeiture, held "...we prefer to interpret the requirement of monthly accounting as a promise rather than a condition, to the extent the provision is ambiguous. *Prager's, Inc. v. Bullitt Co.*, 1 Wash.App. 575, 463 P.2d 217 (1969); 3A A. Corbin, *Corbin on Contracts* s 635 (1960)." *Koehler v. Wales*, 16 Wn. App. 304, 310, 556 P.2d 233, 237 (1976). Further case law supports interpreting contracts so they do not effectuate forfeitures. As mentioned, *Jones Associates, Inc. v. Eastside Properties, Inc.* was a case wherein a condition precedent was urged by the recipient of services to avoid payment. The court interpreted the provision at issues as a covenant as opposed to a condition precedent noting well established law that forfeitures are not favored:

Further, it is well-established that

forfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit of no denial.

*Kaufman Bros. Constr. v. Olney*, 29 Wash.App. 296, 300, 628 P.2d 838 (1981) (quoting *Dill v. Zielke*, 26 Wash.2d 246, 252, 173 P.2d 977 (1946)).

Jones Associates, Inc. v. Eastside Properties, Inc., at 469. Similarly, Judge Blinn was on solid legal ground to not interpret a questionable Agreement provision as a condition precedent.

Second, as discussed below, Judge Blinn could have explicitly found a condition precedent and refused to enforce it as it would create a forfeiture. Either way, we end up at the same point – Judge Blinn properly exercising his equitable powers.

c. **Even if the trial court found a condition precedent, the trial court would not have erred if it refused to enforce it in a manner which effectuated a forfeiture.**

For the reasons in the preceding sections, Northwood contends that there is neither a breach/default nor was missing the deadline a material breach. Even if there was a material breach, it would not warrant a forfeiture. Judge Blinn clearly found that the potential loss of the \$765,000 was a forfeiture. Lennar does not even challenge such decision, but rather calls it a “legitimate” forfeiture. Appellate Brief p. 15-16. The cases cited by Lennar related to “material breach” and “time being of the essence” drives this home. Putting aside the lack of the 10 day notice, Lennar only cites to the black letter law aspects of such cases and ignores the second half of the cases wherein equitable principals come into play.

Lennar cites to Ryker v. Stidham, 17 Wn. App. 83, 561 P.2d 1103 (1977) as to a court enforcing a “time is of the essence clause”. However, the trial court, which was affirmed, after finding a failure to properly meet a condition precedent exercised its equitable powers to grant an extension to allow performance:

After trial, the court found for the sellers, decreeing the contract terminated and forfeited. Exercising his equitable powers, the trial judge granted to the purchasers a “grace period” of six (6) months from March 26, 1975, during which period said Defendants may redeem the . . . property by paying to the Plaintiffs, . . . (\$23,316.77) . . . plus interest thereon . . . and real property taxes . . . (costs and attorneys' fees).

Id. at 85–86. Division 2 discussed how allowing a forfeiture “**would do violence to the principles of substantial justice**”. (Emphasis added) Id. at 89. Such case does not help Lennar as, even if there was a material breach, Judge Blinn would not be abusing his discretion in granting an equitable remedy to avoid a forfeiture.

The Moeller v. Good Hope Farms, 35 Wn.2d 777, 215 P.2d 425 (1950) cited by Lennar as to discussing “time being of the essence” in a forfeiture situation – dealt with real estate contract forfeitures before the enactment of RCW 61.30, the Real Estate Contract Forfeiture Act. Such act was enacted to clarify and supersede prior case law on forfeitures, time being of the essence, waiver and ability to cure. See, §

21.23.Performances by purchaser, 18 Wash. Prac., Real Estate § 21.23 (2d Ed.). Such act superseded cases such as Moeller so as to make a uniform, equitable process to forfeit real estate contract as opposed to the ad hoc, case by case approach that Moeller typified. Still, Lennar citing Moeller is a bit odd in that the Washington Supreme Court reversed the trial court's forfeiture and remanded for the imposition of an equitable grace period of 60 days to pay off the contract and avoid a forfeiture where the purchaser had already paid about half of a \$115,000 contract. Id. at 778-781. The Washington Supreme Court explained:

But it is the settled rule in this state that forfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit of no denial. In order to avoid the harshness of forfeitures and the hardship that often results from strict enforcement thereof, the courts have frequently granted a 'period of grace' to a purchaser before a forfeiture will be decreed. Such procedure is not a denial of the right to forfeit the contract, but is a condition imposed upon that right when the equities of a particular case warrant it. See Dill v. Zielke, 26 Wash.2d 246, 173 P.2d 977; DeWhite v. Dent, 177 Wash. 418, 31 P.2d 1018.

Id. at 783.

The cases cited by Lennar where the courts actually enforced condition precedents did not have significant forfeitures, if any. Lennar cites to Nelson v. Trent, 184 Wn. App. 1056 (2014) wherein, simplified, Nelson had a contract with SDC Homes, LLC (Trent was SDC's president) wherein Nelson was to get a \$1000 stipend for each home sold. Id. at \*1.

SDC fired Nelson and then sold its 256 vacant lots in bulk to another entity. Id. Nelson sued for the commission on such bulk sales and the trial court dismissed and the Court of Appeals affirmed. The case was decided largely on the explicit contractual language of how the stipend was earned on the sale of a “home” versus wholesale bulk transfers of lots. Id. at \*2. Still, the court did discuss that the sale of a “home” was also a condition precedent to the obligation of the employer to pay the stipend. Id. at \*3. However, such case does not note any contribution of cash or significant effort by Nelson. No argument by Nelson that application of the condition precedent would effectuate a forfeiture is mentioned in the decision. So, such case enforced the condition precedent in an employment situation as the court found the stipend was not earned. There was no forfeiture.

To further illustrate how Lennar’s cited cases do not help its position, Lennar cites to Tacoma Northpark, LLC v. NW, LLC, 123 Wn. App. 73, 96 P.3d 454 (2004). Such case was also involved a contract to purchase property after a plat was completed. Now, such case is a bit more convoluted than the present situation as third party purchasers were involved. Also, the case was a bit reversed than the present case as it involved a claim for damage by the promisee against a promisor. Still, this court refused to allow such damages citing to the good faith efforts of

the promisee. Id. at 82. The point is, courts have a great reluctance to have parties punished based upon operation of condition precedents. The Tacoma Northpark case is not really on point as it does not discuss forfeitures at all.

In looking at condition precedents, this court should be guided by extensive precedent that they are disfavored at law. “[C]onditions precedent are not favored by the courts. *Thomas v. French*, 30 Wn. App. 811, 819, 638 P.2d 613 (1981).” Jones Associates, Inc. v. Eastside Properties, Inc., 41 Wn. App. 462, 470, 704 P.2d 681, 686 (1985). “[C]onditions precedent ‘are not favored by the law, and are to be strictly construed against one seeking to avail himself of them,’ *Antonelle v. Kennedy & Shaw Lumber Co.*, 140 Cal. 309, 73 P. 966, 968 (1903).” Carvalho v. Equifax Info. Servs., LLC, 629 F.3d 876, 891 (9th Cir. 2010); see also, (citations omitted) Jones Associates at 469.

This court should be clear that Lennar is trying to effectuate a forfeiture. Jones Associates, Inc. v. Eastside Properties, Inc., at 469 footnotes to the Restatement of Contracts to define a forfeiture:

The Restatement (Second) of Contracts § 227 comment b (1981) defines “forfeiture” as the resulting denial of compensation where the nonoccurrence of a condition of an obligor's duty causes the obligee to lose his right to the agreed exchange after he has relied substantially on the expectation of that exchange, as by preparation or performance.”

This is exactly what Lennar is arguing for or, as its briefing claims, a “fully legitimate” forfeiture. Lennar is arguing that because of (1) an extremely minor delay over which Northwood had little to no control and (2) where there has been substantial (almost complete) performance and (3) where there is not claimed damages, Lennar need not pay the \$765,000 to Northwood. This is not permissible under Washington law and Judge Blinn was well within his discretion to exercise equity to not allow such an extreme forfeiture.

Substantial case law has repeatedly held that courts will not allow forfeitures based upon a failure of a condition precedent. “Conditions precedent are not favored by the courts and will be excused if enforcement would involve extreme forfeiture or penalty and if the condition does not form an essential part of the bargain. Restatement (Second) of Contract § 229 (1982).” Ashburn v. Safeco Ins. Co. of Am., 42 Wn. App. 692, 698, 713 P.2d 742, 745 (1986). Lennar is seeking an “extreme forfeiture” in the amount of \$765,000 even though it has received its benefit of the bargain in the form of five additional lots.

“Forfeiture clauses must always be strictly construed against the grantor, and nothing will be held to cause a forfeiture unless it plainly appears to be such. To justify a forfeiture for the violation of the condition, the violation must be willful and substantial.” Port of Walla

Walla v. Sun-Glo Producers, Inc., 8 Wn. App. 51, 59, 504 P.2d 324, 330 (1972) citing In re Estate of Murphy, 191 Wash. 180, 188, 71 P.2d 6 (1937), rev'd on other grounds, 193 Wash. 400, 75 P.2d 916 (1938); Central Christian Church v. Lennon, 59 Wash. 425, 109 P. 1027 (1910).

No one has ever claimed that the minor delay in the plat modification was intentional. Lennar has not claimed the violation to have been substantial. At no point in this litigation has Lennar ever claimed to suffer any damages. See Appellant's Opening Brief at page 3 ("The trial court held that the only issue for trial was Lennar's claim damages for breach, again a claim Lennar never made.").

To illustrate how courts will not allow an insubstantial breach to trigger a condition precedent, in Port of Walla Walla v. Sun-Glo Producers, Inc. a lessor tried to deny a lease extension, in part, based upon the failure to submit annual financial statements. The court, in citing to the aforementioned case law as to disfavor, willfulness and substantiality, found the evidence did not show the failure to provided financial statements to be a substantial breach. Id. at 59.

Other case law discusses how the court's equitable powers may be used to avoid the harshness of forfeitures:

“'[F]orfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit no denial.' ” *Hyrkas v. Knight*, 64 Wash.2d 733,

734, 393 P.2d 943 (1964) (quoting *State ex rel. Foley v. Superior Court*, 57 Wash.2d 571, 574, 358 P.2d 550 (1961)). “In order to avoid the harshness of forfeitures and the hardship that often results from strict enforcement thereof, the courts have frequently granted a ‘period of grace’ to a purchaser before a forfeiture will be decreed.” *Moeller v. Good Hope Farms, Inc.*, 35 Wash.2d 777, 783, 215 P.2d 425 (1950); see also *Dill v. Zielke*, 26 Wash.2d 246, 252–53, 173 P.2d 977 (1946). Whether a grace period is warranted depends on the equities in each particular case. *Moeller*, 35 Wash.2d at 783, 215 P.2d 425.

Pardee v. Jolly, 163 Wn.2d 558, 574, 182 P.3d 967, 976 (2008). In Pardee the forfeiture avoided was far less than the present case: “If the option is deemed terminated, Pardee not only loses \$16,000, which would be an acceptable result for the termination of an option, he also loses the \$20,669.58 he invested in repairing the house and the 2,500 hours that he spent working on the house so that he could use it as collateral for a mortgage. This is a significant forfeiture that should be analyzed using the equitable principles set forth in *Wharf Restaurant* and *Heckman Motors*.” Id. at 576. The forfeiture avoided in Jones Associates, Inc. was “\$15,030 plus interest.” Id. at 463. In reversing a trial court’s finding of a condition precedent, the Court of Appeals remanded to allow additional evidence of a forfeiture when the amount at issue was about \$35,000. Lokan & Associates, Inc. v. Am. Beef Processing, LLC, 177 Wn. App. 490, 503, 311 P.3d 1285, 1291 (2013).

In the present case we are talking about \$765,000. This is a harsh forfeiture under any definition and Judge Blinn did not abuse his discretion in making this obvious conclusion and in exercising equity to avoid such a forfeiture.

**d. If the court were to dismiss the contractual claims based upon a condition precedent, it should remand for reinstatement of the equitable claims.**

Northwood pleaded alternative claims. The first was the contractual claims that Judge Blinn has ruled upon, subject to setoff for any damages that Lennar may prove. CP 4. The second was a claim in quantum meruit/unjust enrichment for the value of the services conveyed by Northwood to Lennar. CP 4. The contract and equitable claims are alternative and inconsistent theories. Both should not proceed at the same time to trial.

However, to the extent this court were to reverse Judge Blinn and hold that due to the nonperformance of a condition precedent, no contractual obligations arose, then equitable remedies in the absence of a contract would be appropriate. “Generally speaking, the law recognizes two classes of implied contracts; those implied in fact, and others implied in law. Those falling within the latter classification are generally termed quasi contracts. 17 C.J.S., Contracts, p. 317, § 4. Contracts implied in fact arise from facts and circumstances showing a mutual consent and

intention to contract. *Troyer v. Fox*, 162 Wash. 537, 298 P. 733, 77 A.L.R. 1132. Quasi contracts arise from an implied legal duty or obligation, and are not based on a contract between the parties, or any consent or agreement. *Bicknell v. Garrett*, 1 Wash.2d 564, 96 P.2d 592, 126 A.L.R. 258; *King County v. Odman*, 8 Wash.2d 32, 111 P.2d 228, 133 A.L.R. 1440.” *Chandler v. Washington Toll Bridge Auth.*, 17 Wn.2d 591, 600, 137 P.2d 97, 101 (1943). To recover on a quasi-contract theory, “it must appear that the service performed was rendered with intent to ask remuneration therefor.” *Chandler v. Washington Toll Bridge Auth.*, 17 Wn.2d 591, 603, 137 P.2d 97, 103 (1943).

Northwood performed the plat modifications with the intent that it would be paid for the service to Lennar. The documentation between the parties reflects that \$765,000 was the compensation for the plat modification. Northwood is not a charity and Lennar is not a charity-case. The law provides the quasi contract theory as a means to avoid unjust enrichment and compensate parties like Northwood who have rendered a valuable benefit to another party like Lennar.

Lennar solicited Northwood to create the Plat Modification. It offered \$765,000 for it. Northwood did the work and Lennar has the plat modification with the five additional lots created. Lennar should pay for the benefit. “[T]he elements of a contract implied in law are: (1) the

defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment.” Young v. Young, 164 Wn.2d 477, 484–85, 191 P.3d 1258, 1262 (2008). Lennar received the five extra lots through the Plat Modification. The Plat Modification was done entirely at Northwood’s substantial expense and effort. It is unjust to allow Lennar to retain the value of five additional lots without payment. The undersigned reminds the Court that this case should be interpreted under a contractual promise/covenant analysis, but in the event the Court finds an enforceable condition precedent, there remains a quasi contract claim for which Northwood ought to receive the value of its service. Accordingly, should the court enforce a condition precedent, the case would then be remanded for a trial on the quantum meruit amount – essentially the trial court’s ruling prior to the reconsideration.

#### **VI. REQUEST FOR ATTORNEY FEES**

The contract has an attorney fee provision at Section 10.19. RCW 4.84.330 makes an award of fees mandatory but the amount is discretionary with the court. (citations omitted) Hawkins v. Diel, 166 Wn. App. 1, 10, 269 P.3d 1049, 1053 (2011). Such contractual provision Section 10.19 and statute provide a basis for an award upon appeal. W. Coast Stationary Engineers Welfare Fund v. City of Kennewick, 39 Wn.

App. 466, 475–76, 694 P.2d 1101, 1107 (1985). Accordingly, in the event this discretionary review is denied, Respondent should be allowed to submit for attorney fees under RAP 18.1(d).

## VII. CONCLUSION

This is not a simple “condition precedent” case as Lennar claims. Lennar’s own Agreement provides for contractual remedies and not forfeiture. In its Opening Brief at Page 15-16 claims that this “forfeiture is fully legitimate under very clear and well established law.” However, that is just not true. Over and over, the cases cited by Lennar ignored the second half of the cases wherein the trial court, the Court of Appeals and the Supreme Court exercised equity to avoid forfeitures in cases with significantly less dollar amounts at issue than in this case. Lennar does not cite to a single case wherein a court allows a forfeiture, let alone finds it a “fully legitimate” forfeiture.

On the other hand, Northwood has cited case after case where courts have upheld a trial court’s exercise of equitable principles to avoid a forfeiture – and some cases where the trial court was reversed when it effectuated a forfeiture. Case after case sets forth that “forfeitures are not favored and never enforced.”

Judge Blinn was faced with several ways he could have approached the case. He decided he would take the path of interpreting the contract as

covenants as opposed to conditions to avoid a forfeiture. This was neither error on a legal level nor on an equitable level. Legally such deadline was tied to default notice provisions and then to remedies. That is a contract promise/covenant breach analysis – not a condition precedent analysis. Moreover, if it was any doubt as to the proper interpretation, Judge Blinn followed binding precedent in construing the provisions as a covenant and not a condition.

Even if this court were to disagree with Judge Blinn on his chosen path, finding the Agreement provision to be a condition precedent would then lead to the conclusion that it would effect a forfeiture and be unenforceable. The court could affirm on such basis.

Finally, even if this Court found that the condition precedent was not met and no contract obligations arose, Northwood still provided services under the expectation of being compensated and Lennar has been enriched by such services giving rise to a situation where the court could find a quasicontract and make an award in quantum meruit.

Judge Blinn took one of four legally defensible routes. Given that there is so clearly a forfeiture, Judge Blinn really had two choices: Interpret the provisions to be a covenant or find it to be an unenforceable condition. He choose the former as was well within his discretion. This appeal should be

rejected and this matter remanded for entry of judgment for the \$765,000 as Lennar, in this appeal, has admitted it has no damages to offset.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of December, 2018.



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MARTIN BURNS, WSBA No. 23412  
Attorney for Respondent

**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 4<sup>th</sup> day of December, 2018, at Tacoma, Washington, I caused true and correct copies of the document to which this certification is affixed to be served upon all parties and/or their counsel of record at their last known addresses in the manner indicated below:

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- Email

DATED this 4<sup>th</sup> day of December, 2018, at Tacoma, Washington.

**BURNS LAW, PLLC**

By Shelley Foster  
Shelley Foster  
Paralegal

\\LAW1\Law\Clients\30000\30491 Singh (Northwood Estates LLC)\Appeals\Respondent's Brief\Brief of Respondent.doc

**BURNS LAW, PLLC**

**December 04, 2018 - 3:56 PM**

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