

No. 36609-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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

Appellant,

vs.

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

Respondent.

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APPELLANT'S REPLY BRIEF

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## I. INTRODUCTION

This case illustrates the problems that occur when 1) a PSA attempts to convey property that does not exist, nor is subject to legal description, at the time of formation; and 2) when the PSA seeks to convey an undescribed portion of a larger parcel.

Riverside wants to compel<sup>1</sup> Grand Ridge to convey 20 lots within the Grand Ridge Phase IV Subdivision.<sup>2</sup> The problem with Riverside's claim is that the exact boundaries of the 20 lots<sup>3</sup> were not determined or described until the subdivision was approved, which was nearly four (4) years after the PSA was signed. Moreover, the 20 lots were carved out of a larger parcel described in the PSA after the PSA was formed. Some portions of the larger parcel were conveyed to Clark County after the PSA was signed.

The questions presented by this appeal are whether the statute of frauds requires the property to exist, and be subject to legal description, at

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<sup>1</sup> In a suit for specific performance, Riverside has the burden to prove, by clear and convincing evidence, that the agreement contains all of the "material and essential" terms. *Hubbell v. Ward*, 40 Wn.2d 779, 246 P.2d 468 (1981). Specific performance can only be granted if the material terms are clear on the face of the contract. *Keys v. Klitten*, 21 Wn.2d 504, 151 P.2d 989 (1944).

<sup>2</sup> Riverside initially contracted to purchase 22 lots. CP 1. This changed to 21 lots and eventually dwindled to 20 lots once the final subdivision was approved. CP 23, 593. In addition, the configuration of those 20 lots changed between the time the PSA was formed and when Riverside's Complaint for specific performance was filed. *Id.*

<sup>3</sup> As Riverside ironically points out, "it would have been impossible for Grand Ridge to convey non-existent lots." Br. of Resp., p. 36.

the time a PSA is formed, and whether a PSA can be used to convey undescribed portions of a larger parcel. Riverside does not squarely address these issues in its Response,<sup>4</sup> other than to suggest, without any legal authority or analysis, that: (1) future finished lot agreements are widely used in the real estate industry and therefore require “special” treatment;<sup>5</sup> and, (2) escrow agents have broad authority under this Court’s holding in *Nishikawa* to “wait until” the property to be conveyed is actually “created before inserting the legal description.”<sup>6</sup>

Riverside’s Response ignores the statute of frauds’ basic tenets and overextends this Court’s ruling in *Nishikawa*.

## **II. STATEMENT OF THE CASE IN REBUTTAL**

Riverside’s Statement of the Case is actually more argument than a “fair statement of the facts.”<sup>7</sup> Grand Ridge supplements its Statement of the Case as follows:

1. The PSA was formed before Grand Ridge applied for the subdivision.<sup>8</sup> The number, location, and configuration of the “finished

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<sup>4</sup> Riverside generally asserts, without citation to authority, that specific lots to be conveyed in the future need not exist at the time the purchase and sale agreement is executed, nor does a document legally describing the property to be created need exist at the time of execution, as long as the property has been created and described by the time of closing. Br. of Resp. at 13-14.

<sup>5</sup> *Id.* at 15.

<sup>6</sup> *Id.* at 22-23.

<sup>7</sup> RAP 10.3(a)(4). The Statement of the Case must be a “fair statement of the facts and procedures relevant to the issues presented for review, **without argument**” (emphasis added).

lots” changed between the time the PSA was formed and final plat approval.<sup>9</sup>

2. Addendum 8, the final addendum, was signed on September 8, 2004 solely to modify the name of the seller from Grand Ridge, LLC to Grand Ridge IV, LLC.<sup>10</sup> The Addendum stated that all previous terms and conditions would remain in full force and effect. Although it was signed after Clark County approved the preliminary plat, Addendum 8 did not change Addendum 1’s legal description or refer to the preliminary plat. The Preliminary Plat did not provide a legal description for the lots within the proposed subdivision.<sup>11</sup> The lots were not surveyed or described until Clark County approved and authorized the final plat to be recorded.<sup>12</sup>

3. The original PSA described the property to be conveyed as “22 future finished lots located in” Grand Ridge’s larger parcel.<sup>13</sup> Paragraph 1 of Addendum 1 replaced that description by describing the property to be conveyed as “twenty-one (21) finished lots in the proposed

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<sup>8</sup> CP 7, 392.

<sup>9</sup> CP 7, 593. Compare Exhibit “C” to Addendum 1 (App-30 to Appellant’s Opening Brief) to the Final Plat recorded with Clark County on March 30, 2006 (App-3 to this Brief).

<sup>10</sup> CP 37 (App-41 to Appellant’s Opening Brief).

<sup>11</sup> CP 789.

<sup>12</sup> CP 593. Compare App-2 to App-3 of this Brief. App-2 did not legally describe the property.

<sup>13</sup> CP 7 (App-21 to Appellant’s Opening Brief).

Plat of Grand Ridge.”<sup>14</sup> Paragraph 1 further provided that the finished lots would be “contained with[in] the boundaries of the property described in Schedule A of the commitment for title insurance..., attached as Exhibit “C.”<sup>15</sup> Schedule A actually described Grand Ridge’s larger parcel from which the 20 lots were eventually created. Exhibit “C” depicts the configuration and number of lots that were being “proposed” when Addendum 1 was signed. No other addenda addressed, modified, or corrected the legal description provided in Addendum 1. The final layout and number of lots approved and recorded by Clark County were markedly different than the layout shown in Exhibit “C.”<sup>16</sup>

4. Riverside sued for specific performance on May 18, 2006. Riverside sought only to acquire the 20 lots described in the Final Plat.<sup>17</sup> Riverside does not seek to acquire those portions of the larger property dedicated to the County for storm water, roads, and sidewalks.

### **III. ARGUMENTS**

#### **A. The Property Must Exist and be Subject to Legal Description at the Time the PSA is Formed.**

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<sup>14</sup> CP 23 (App-27 to Appellant’s Opening Brief).

<sup>15</sup> CP 23 (App-30 to Appellant’s Opening Brief). Exhibit “C” is actually a plat map and not the legal description that was attached to the referenced title report.

<sup>16</sup> Compare App-30 to Appellant’s Opening Brief (CP 23) to App-3 to this Brief (CP 593).

<sup>17</sup> See App-4 to this Brief which is Exhibit 1 to Riverside’s Complaint.

Riverside asks in its Response: “Why wouldn’t an escrow agent be allowed to wait until the plat is recorded and the property description changes (sic) at some point in the future before inserting the legal description?”<sup>18</sup> The answer is because the statute of frauds requires that the property to be conveyed be in existence, and subject to legal description, **at the time** the PSA is executed.<sup>19</sup> Permitting an escrow agent to wait until after the PSA is signed to describe a property that did not exist, and therefore was not subject to legal description, when the PSA was signed would eviscerate the statute of frauds.

1. Washington Requires Strict Compliance with the Statute of Frauds.

Riverside argues that the statute of frauds should be “applied narrowly” and only to cases that fit “squarely within its terms.”<sup>20</sup> There is no question that purchase and sale agreements are subject to, and must satisfy, Washington’s statute of frauds.<sup>21</sup>

Once it is determined that the statute of frauds applies, the courts uniformly require “strict compliance,” meaning that a purchase and sale

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<sup>18</sup> Br. of Resp., p. 23.

<sup>19</sup> *Bigelow v. Mood*, 56 Wn.2d 340, 341, 353 P.2d 429 (1960); *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995).

<sup>20</sup> Br. of Resp., p. 11.

<sup>21</sup> RCW 64.04.010-020; *Key Design, Inc. v. Moser*, 138 Wn.2d 875, 881, 983 P.2d 653 (1999) (contract for conveyance of land must contain legal description of property).

agreement must contain a description of the land “sufficiently definite to locate it without recourse to oral testimony.”<sup>22</sup>

**a. No Distinction Exists Between PSA and Deeds.**

Riverside argues, without legal authority or analysis, that, because “the property description at the time a purchase and sale agreement is executed [will] necessarily change before closing,” “finished lot agreements” require “special attention” by the courts.<sup>23</sup> Riverside seems to suggest that the Court should **not** apply the statute of frauds as strictly to finished lot agreements as it does to deeds or to real estate contracts.<sup>24</sup>

The statute of frauds, and the requirement for adequate legal descriptions, applies with equal force to deeds, purchase and sale agreements, and even finished lot agreements.<sup>25</sup> All contracts that involve the conveyance of real property must satisfy the statute of frauds by either containing an adequate legal description of **an existing** property to be conveyed, or by referencing another existing document that contains an

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<sup>22</sup> *Id.* at 881, citing *Martinsen v. Cruikshank*, 3 Wn.2d 565, 567, 101 P.2d 604 (1940).

<sup>23</sup> Br. of Resp., p. 15.

<sup>24</sup> *Id.* at pp. 12-14.

<sup>25</sup> RCW 64.04.010; *Martin v. Seigal*, 35 Wn.2d 223, 227, 212 P.2d 107 (1949) (“It is fair and equitable to require people dealing with real estate to properly and adequately describe it, so that courts may not be compelled to resort to extrinsic evidence in order to find out what was in the minds of the contracting parties.”); *Key Design*, 138 Wn.2d at 881.

adequate description.<sup>26</sup> The statute of frauds can also be satisfied by delegating to a third person the authority to insert a correct legal description, provided both the property and the legal description exist at the time the PSA is signed.<sup>27</sup>

**b. Future Finished Lot Agreements are Not Subject to a Different Standard.**

Riverside charges that Grand Ridge is seeking to challenge the validity of “all” development agreements “involving the future development and sale of finished lots.”<sup>28</sup> This is not true. Grand Ridge believes that development agreements can, and have been, drafted to comply with Washington’s statute of frauds.<sup>29</sup> However, the only issue in this case is whether this particular PSA is valid.

The PSA in this case violates the statute of frauds because, as Riverside admits, it: (1) failed to describe what portion of the larger parcel was to be conveyed; (2) seeks to convey property with boundaries that could not be determined until the final plat was recorded; and, (3) required the escrow agent to “wait” and see what property would be

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<sup>26</sup> *Bigelow v. Mood*, 56 Wn.2d 340, 341, 353 P.2d 429 (1960).

<sup>27</sup> *Noah v. Montford*, 77 Wn.2d 459, 463, 463 P.2d 129 (1969); *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995).

<sup>28</sup> Br. of Resp., p. 33.

<sup>29</sup> As Riverside acknowledges, this PSA, which apparently is a standard form that Riverside uses in Oregon, was fraught with errors and was the result of “sloppy” drafting. The fact that this particular PSA fails to pass legal muster certainly does not mean that other development or finished lot agreements will suffer the same fate.

created, and how that property would be configured, before they could insert a legal description.<sup>30</sup>

**c. The Statute of Frauds is a Defense to the Enforcement of a Purchase and Sale Agreement.**

Riverside gripes that Grand Ridge is using the statute of frauds as a technicality to get out of a bad deal.<sup>31</sup> Virtually every case involving the statute of frauds involves one side using the statute of frauds as a means to invalidate a “bad” deal.<sup>32</sup> The courts have ameliorated the potential harsh effect of the statute of frauds by adopting equitable exceptions, such as the part performance doctrine.<sup>33</sup> The circumstances of this case do not support such a claim nor has Riverside sought such relief. Regardless, Grand Ridge’s motives are not material to whether the PSA satisfies the statute of frauds.

Riverside next contends that applying the statute of frauds would perpetuate a fraud.<sup>34</sup> As the Court in *Berg* noted when it rejected this argument, there is no evidence of fraud by either party.<sup>35</sup> Indeed, as was the case in *Berg*, it was Riverside’s counsel who prepared the PSA.

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<sup>30</sup> When Grand Ridge and Riverside executed this PSA, the parties could not determine the boundaries of property to be conveyed at closing.

<sup>31</sup> Br. of Resp., p. 9.

<sup>32</sup> *Berg, supra*; *Sea-Van, supra*; *Howell, infra*; *Bigelow, infra*; *Nishikawa, infra*; *Garrett*.

<sup>33</sup> *Berg v. Ting*, 125 Wn.2d at 556.

<sup>34</sup> Br. of Resp., p. 11.

<sup>35</sup> *Berg*, 125 Wn.2d at 550.

Riverside also argues that the parties knew what property was intended to be conveyed.<sup>36</sup> This is not a substitute for compliance with the statute of frauds because it would require resort to oral testimony, which is precisely what the statute of frauds is designed to prevent.<sup>37</sup>

*Bartlett* involved a conveyance between family members. The parties described the parcel by reference to “the house in which the grantees currently reside.” Everyone knew what property the parties intended to convey because the grantees were the only ones residing in the house. The Court held that, despite the grantor knowing the exact location of the property, and his admission in court that he knew the description of the property, the conveyance was void.<sup>38</sup> This is consistent with the rule that a description of land must be sufficiently definite to locate it without recourse to oral testimony.<sup>39</sup>

**d. A PSA Involving Future Lots Within a Subdivision Must Comply with Both the Statute of Frauds and RCW 58.17.**

Riverside also contends that the Washington legislature has expressly approved the sale of “future” lots.<sup>40</sup> Riverside seems to imply

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<sup>36</sup> Br. of Resp., p. 7.

<sup>37</sup> See *Bartlett v. Betlach*, 136 Wn. App. 8, 146 P.3d 1235 (2006).

<sup>38</sup> Br. of Resp., p. 15.

<sup>39</sup> *Bigelow*, 56 Wn.2d at 341.

<sup>40</sup> Br. of Resp., p. 34.

that RCW 58.17.205 contains an exception to the statute of frauds for the conveyance of future lots.

Riverside is mistaken. RCW 58.17.205 is not an exception to the statute of frauds. Rather, the statute places additional burdens on those who seek to convey parcels that have not yet been divided. The PSA in this case therefore had to satisfy both the statute of frauds and RCW 58.17.205.<sup>41</sup>

In this case, preliminary plat approval occurred before the parties executed Addendum 8.<sup>42</sup> Addendum 8 simply changed the name of Grand Ridge, LLC to Grand Ridge Properties IV, LLC.<sup>43</sup> It did not address the legal description contained in Addendum 1 nor did it even make reference to the preliminary plat.<sup>44</sup>

Regardless, only a final plat—not a preliminary plat—can provide a legal description of the property once it is accepted by the County and recorded with the County Auditor. The adequacy of a particular legal description depends upon whether the land to be conveyed is platted or

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<sup>41</sup> RCW 58.17.205 has two requirements for the conveyance of land prior to final plat approval: 1) the contract must be executed *after* preliminary plat approval; and, 2) the contract must be expressly conditioned on the recording of the final plat of the property.

<sup>42</sup> CP 37, 789.

<sup>43</sup> CP 37.

<sup>44</sup> CP 37.

unplatted.<sup>45</sup> The term “platted lands” refers to land that has or is being sold as separate individual lots where the land is or was subject to the recording of a final plat, such as the case here.

The Supreme Court of Washington has stated that every contract or agreement involving a sale or conveyance of platted real property “must contain, in addition to the other requirements of the statute of frauds, the description of such property by the correct lot number(s), block number, addition, city, county, and state.”<sup>46</sup> The preliminary plat for the property simply depicts the lots without providing any other information to legally describe the property.

In this case, there is no evidence that the lots contained within the preliminary plat were surveyed before preliminary plat approval.<sup>47</sup> The legal descriptions were not inserted until the final plat was approved and recorded with the County. Therefore, the 20 lots in the approved

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<sup>45</sup> See *Bingham v. Sherfey*, 38 Wn.2d 886, 234 P.2d 489 (1951) (Unplatted land may be described as a Tax Lot if the section, township, range, county, and state are identified along with the Assessor’s Tax Lot number. Here, even assuming that this was unplatted land, the legal description violates the statute of frauds because the section, township, range, and county are not identified.).

<sup>46</sup> *Martin v. Seigal*, 35 Wn.2d 223, 229, 212 P.2d 107 (1949); see also RCW 58.17.160, requiring the final plat contain a survey and description of the property before it may be filed and recorded with the auditor. No such requirement exists for a preliminary plat. Preliminary plats are never recorded with an auditor’s office.

<sup>47</sup> Compare App-3 to this Brief (CP 593) to App-2 to this Brief (CP 789). The preliminary plat does not contain a legal description but the final plat does.

preliminary plat were still undescribed lots on a sketch when Addendum 8 was signed.<sup>48</sup>

Riverside argues (without legal authority), that Addendum 8 changed the effective date of the PSA and therefore updated the legal description. Addendum 8 simply modified the PSA to correct the name of the Grantor. It did not blow new life into an otherwise invalid agreement. It simply modified the terms of the existing PSA. This is particularly damaging to Riverside's position when one considers that Riverside could have, as Grand Ridge was willing to do before it was sued, execute another Addendum to provide an adequate legal description of the 20 lots.<sup>49</sup>

2. The Property to Be Conveyed Must Exist at the Time the PSA is Executed.

*Berg v. Ting* is directly on point.<sup>50</sup> The parties in *Berg* attempted to describe the servient estate, for purposes of granting an easement, with reference to a future "finally approved" short plat application.<sup>51</sup> The only description of the servient estate was the reference to the approved final plat that was not in existence at the time the easement was granted and

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<sup>48</sup> CP 789.

<sup>49</sup> See Br. of Resp., p. 8, where Riverside acknowledges that Grand Ridge sought to execute another addendum to correct this issue.

<sup>50</sup> 125 Wn.2d 544, 886 P.2d 564 (1995).

<sup>51</sup> *Id.* at 549.

would not come into existence for another four (4) years.<sup>52</sup> Because that document, and consequently the property, was not in existence at the time the easement was granted, the court invalidated the easement holding that both the property to be burdened with the easement and the legal description of that property had to be in existence at the time the deed was signed.<sup>53</sup>

In reaching its holding, the Court noted that, as finally approved, the “application contained six, not seven lots, and the lots were reconfigured and redesignated.”<sup>54</sup> Moreover, the trial court in *Berg* noted that the parties referred to a “future document with uncertain terms and uncertain legal descriptions.”<sup>55</sup> Reliance on a future instrument that describes property that does not exist runs afoul of the statute of frauds because it requires resorting to oral testimony to locate the property.

The holding in *Berg* controls this case for two reasons: First, *Berg* holds that compliance with the statute of frauds requires that the legal description be inserted in the PSA, or if the PSA references another instrument, that this instrument exist at the time the purchase and sale

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 550.

agreement is executed. Second, *Berg* requires the land to be conveyed exist at the time the document conveying the property is executed.

The present case is nearly identical to *Berg* in that the future finished lots to be conveyed to Riverside did not exist when the PSA was formed. Moreover, there was no document for the escrow agent to insert that described the parcels to be conveyed at the time the PSA was signed. Therefore, as in *Berg*, the PSA is void.

3. The Property to be Conveyed Must be Capable of Being Legally Described when the PSA is Executed.

Although the statute of frauds may be met by multiple writings, it must be met at the time of the formation of the contract.<sup>56</sup> The statute of frauds will be met if the PSA refers to another **then-existing** document that contains a **then-existing** legal description,<sup>57</sup> or if the contract or deed authorizes an agent to insert a then-existing legal description.<sup>58</sup> The statute of frauds will not be met, however, if the PSA refers to a monument not yet in place<sup>59</sup> or to a document not yet in existence.<sup>60</sup>

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<sup>56</sup> *Sea-Van Investments Assocs. v. Hamilton*, 71 Wn. App. 537, 541, 861 P.2d 485 (1993), *rev'd on other grounds*, 125 Wn.2d 120, 881 P.2d 1035 (1994).

<sup>57</sup> *Berg*, 125 Wn.2d at 551; *Sea-Van*, 71 Wn. App. at 541; *Bigelow*, 56 Wn.2d at 341.

<sup>58</sup> *Noah v. Montford*, 77 Wn.2d 459, 463, 463 P.2d 129 (1969); *Schweiter v. Halsey*, 57 Wn.2d 707, 713-14, 359 P.2d 821 (1961); *Edwards v. Meader*, 34 Wn.2d 921, 923-25, 210 P.2d 1019 (1949).

<sup>59</sup> *Bigelow*, 56 Wn.2d at 341.

<sup>60</sup> *Berg*, 125 Wn.2d at 551.

While Grand Ridge did provide a metes and bounds description of the property when the PSA was formed, the description is irrelevant because Riverside seeks to acquire something less than the entire parcel. The parties initially believed Grand Ridge was going to convey 22 lots.<sup>61</sup> They later modified the PSA to indicate the sale of 21 lots.<sup>62</sup> Riverside now seeks to acquire 20 lots.<sup>63</sup> As in *Berg*, the lots to be sold were “reconfigured and redesignated” multiple times throughout the development process and after the PSA was signed.

**a. The Exact Boundaries of the Property Must Be Capable of Legal Description at the Time the Agreement is Executed.**

The statute of frauds requires that a legal description for the property exist at the time the contract is executed.<sup>64</sup> Waiting for the property to be created, and then relying upon other documents not referenced in the purchase and sale agreement (final plat), would require

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<sup>61</sup> PSA, CP 7.

<sup>62</sup> Paragraph 1 of Addendum 1, CP 23.

<sup>63</sup> Final Plat, CP 593.

<sup>64</sup> In *Sea-Van Investment Assocs. v. Hamilton*, the Court held that the statute of frauds must be “met at the time of the formation of the contract.” The Court of Appeals also held that a judicial admission or stipulation is sufficient to satisfy the statute of frauds. 71 Wn. App. at 541. The Supreme Court overturned this portion of the decision and refused to recognize any exceptions to the rule that the statute of frauds must be satisfied at the time of formation of the contract. 125 Wn.2d 120, 127-29, 881 P.2d 1035 (1994).

the court to resort to oral testimony (extrinsic evidence). This is exactly what the statute of frauds is designed to prevent.<sup>65</sup>

**b. The Property Cannot Be an Undescribed Portion of a Larger Parcel.**

Riverside repeatedly admits that the PSA required Grand Ridge to convey something less than its entire ownership.<sup>66</sup> Addendum 1 also stated that the property to be conveyed (*i.e.* the 21 undescribed lots) is “contained with[in] the boundaries of the property described in Schedule A...” “Contained within” means that the property intended to be conveyed was actually something less than the entire parcel. The question then is whether a PSA can convey an undescribed portion of a larger parcel. The answer in Washington is clearly not.

In *Howell v. Inland Empire Paper Co.*, the Court stated that “a description that designates the land conveyed as a portion of a larger tract without identifying the particular part conveyed” violates the statute of

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<sup>65</sup> *Bigelow v. Mood*, 56 Wn.2d at 340.

<sup>66</sup> Riverside concedes that “all that was different” between the property described at the time the original PSA was signed and the time that the subdivision was approved was that “within that boundary, the property had been divided into 20 separate building lots, plus the streets and a detention pond.” Br. of Resp., p. 5. Riverside also admits, on page 6, that it did not acquire those portions of the property that were conveyed to the County and, on page 30, that it prepared “closing documents to purchase Grand Ridge’s entire property as described (**less roads and ponds dedicated to the County**).” (Emphasis added).

frauds.<sup>67</sup> In *Howell*, the land was described as portions of certain tracts of a larger parcel.<sup>68</sup>

Similar to *Howell*, the PSA here provides that the property to be conveyed, the 21 undescribed finished lots, are “contained with[in] the boundaries” of the larger parcel.<sup>69</sup> There is no evidence that these 21—now 20—lots had been surveyed or were capable of being legally described at the time the PSA was signed. The PSA simply provides that Grand Ridge will convey 21 “finished lots.”

Riverside acknowledges this fatal defect and states that Addendum 1 described exactly what would be conveyed at closing – 21 finished lots to be created from Grand Ridge’s parcel.<sup>70</sup> *Howell* squarely holds that this type of situation is barred by the statute of frauds.

Riverside tries to distinguish *Howell* by arguing that the PSA does not refer to “portions” of the larger parcel and did not use “approximate dimensions.” These are distinctions without a difference. Even Riverside’s arguments show why its position must fail as a matter of law—Grand Ridge did not have 21 lots to convey at closing because only 20 lots were created. Riverside attempts to circumvent this point by

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<sup>67</sup> 28 Wn. App. 494, 495, 624 P.2d 739 (1981).

<sup>68</sup> *Id.* at 495.

<sup>69</sup> CP 37.

<sup>70</sup> Br. of Resp., p. 32.

arguing that the closing documents prepared in 2006, which are not in evidence in this case, satisfy the statute of frauds. However, as shown previously, the statute of frauds must be satisfied at the time the contract is signed.<sup>71</sup> Riverside admits “it would have been impossible” for the parties to have identified parcels that did not exist.<sup>72</sup> This is exactly why the PSA must fail in this case.

**B. A Document Incorporated By a PSA Must Exist at the Time the PSA is Executed.**

The statute of frauds may be satisfied if the PSA refers to another document to provide a legal description.<sup>73</sup> However, both the real property to be conveyed, and the instrument containing the legal description of that property, must exist at the time the PSA is signed.<sup>74</sup>

In *Ecolite Manufacturing Co. v. R. A. Hanson Co.*, the seller entered into separate earnest money agreements to sell adjacent parcels to two (2) different parties.<sup>75</sup> The agreements described the two parcels in terms of square footage and provided approximate sizes. It also described the two adjacent lots as:

a portion of the R.A. Hanson Co. East Sullivan  
Industrial Center... to be surveyed and attached....

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<sup>71</sup> *Sea-Van*, 71 Wn. App. at 542; *Berg*, 125 Wn.2d at 551; *Bigelow*, 56 Wn.2d at 341.

<sup>72</sup> Br. of Resp., p. 36.

<sup>73</sup> *Noah v. Montford*, 77 Wn.2d 459, 463, 463 P.2d 129 (1969).

<sup>74</sup> *Bigelow*, 56 Wn.2d at 341; *Berg*, 125 Wn.2d at 551.

<sup>75</sup> 43 Wn. App. 267, 716 P.2d 937 (1986).

The Location to be “approximate” as in Attachment A and shall border the East-West perimeter road on the south side of the parceled property.<sup>76</sup>

Similar to the case at hand, the Attachment “A” referred to in the earnest money agreements were drawings of each of the two parcels. The parties also granted, as is true in this case, to an agent the authority to “insert over their signature” the “correct legal description” of the property.<sup>77</sup>

Four (4) years after the agreements were signed, the buyers sued for specific performance. They employed a surveyor to survey the lots referenced in Exhibit A to provide legal descriptions. The buyers sued to require Hanson to convey the properties.

The trial court refused, ruling that the agreements did not satisfy the statute of frauds because: (1) the legal descriptions were inadequate; and, (2) the agent could not supply a legal description of properties that were not described at the time the agreements were signed.

The Court of Appeals affirmed. The Court found that, despite the provision that permitted the agent to insert a correct legal description, the agreement was void because it referred to an undescribed portion of a larger parcel and that the parties could not, after the fact, insert a legal

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<sup>76</sup> *Id.* at 269.

<sup>77</sup> *Id.*

description of a previously undescribed property by using an instrument created after the PSA was signed.<sup>78</sup> The Court's holding supports Grand Ridge's argument that the statute of frauds cannot be satisfied unless the property is identified, and is capable of being described, at the time the agreement is formed.

As was the case in *Ecolite*, the PSA in this case failed to specifically describe the parcel(s) being carved out of the larger parcel.<sup>79</sup> Also, as in *Ecolite*, the PSA's faulty description could not be saved by the grant of authority to a third party to insert a correct legal description.

1. The Incorporated Document Must Exist at the Time the PSA is Signed.

As stated in *Berg* and *Sea-Van*, the statute of frauds must be capable of being satisfied at the time the PSA is formed.<sup>80</sup> The statute of frauds can be met if the PSA refers to another then-existing document that contains a then-existing legal description.<sup>81</sup>

2. The Incorporated Document Must Satisfy the Statute of Frauds by Describing the Property.

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<sup>78</sup> Since "the parcels to be conveyed are described" as "portions" of a larger "undefined parcel," the legal descriptions are "patently insufficient" because the court would need to resort to "parol evidence" to "locate the property." *Id.* at 271. The court cited *Garrett v. Shriners Hosps. for Crippled Children*, 13 Wn. App. 77, 533 P.2d 144 (1975) for the proposition that a survey or legal description provided after a dispute arises cannot be used to render an earnest money agreement valid under the statute of frauds.

<sup>79</sup> Riverside admits that the PSA did not contain the "correct" legal description until the time of closing. Br. of Resp., p. 36.

<sup>80</sup> *Berg*, 125 Wn.2d at 551; *Sea-Van*, 71 Wn. App. at 541.

<sup>81</sup> *Berg*, 125 Wn.2d at 551; *Sea-Van*, 71 Wn. App. at 541; *Bigelow*, 56 Wn.2d at 341.

Not only must the referenced document exist at the time the PSA is signed, it must also satisfy the statute of frauds. In *Bigelow v. Mood*, the Supreme Court stated that a real estate contract must reference a document that “contains a sufficient description.”<sup>82</sup> If both the agreement and the referenced document fail to satisfy the statute of frauds, the agreement is void and not capable of being specifically performed.<sup>83</sup> In fact, no document existed at the time the PSA was executed that would satisfy the statute of frauds -- including the exhibits attached to the Plaintiff’s Complaint.

**C. An Escrow Agent Must be Able to Identify and Describe the Property to be Conveyed at the Time the PSA is Executed.**

Riverside relies heavily upon *Nishikawa* to argue that the designation of an escrow agent will serve to protect a PSA from any attack under the statute of frauds. In actuality, the only rule that *Nishikawa* adopted was that a party could not unilaterally withdraw the authority of an escrow agent to insert a legal description.<sup>84</sup>

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<sup>82</sup> *Bigelow*, 56 Wn.2d at 341.

<sup>83</sup> *Schweiter v. Halsey*, 57 Wn.2d 707, 710, 359 P.2d 821 (1961) (An agreement containing an inadequate legal description of the property to be conveyed is void).

<sup>84</sup> *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 844-45, 158 P.3d 1265 (2007).

This Court in *Nishikawa* stated in footnote 2 that there is a “temporal” component to the statute of frauds.<sup>85</sup> In particular, the Court noted that the legal description did not need to be included in the PSA at the time the parties executed the agreement.<sup>86</sup> However, this Court did **not** state that this “temporal” component meant that the property to be conveyed did not need to exist or be subject to legal description at the time the argument was signed.

Turning to the case at hand, an agent only has that authority given to them through the PSA.<sup>87</sup> Riverside argues that the escrow agent in this case could have, as they did, wait for the property to be created, before inserting a legal description. This argument was soundly rejected in *Ecolite* where the Court held that an agent could not insert a survey or legal description that did not exist at the time the agreement was signed.<sup>88</sup> The parties did not (and could not) give escrow the authority to violate the statute of frauds.

Riverside wants this Court to expand its ruling in *Nishikawa* to give agents greater powers than those possessed by the contracting parties. Riverside argues that the “*Nishikawa* rule” permits an escrow agent to

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<sup>85</sup> *Id.* at 849, n. 2.

<sup>86</sup> *Id.*

<sup>87</sup> *Nat’l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 909, 506 P.2d 20 (1973).

<sup>88</sup> *Ecolite*, 43 Wn. App. at 271.

insert, at any time before closing, a legal description of the property, even if that property, and the legal description for that property, did not exist at the time the PSA was formed. This interpretation stretches the holding in *Nishikawa* far beyond what Grand Ridge believes this Court intended.

Moreover, *Nishikawa* is factually distinguishable from this case. In *Nishikawa*, both the property, and the legal description for that property, existed at the time the contract was executed.<sup>89</sup> The property was also not an undescribed portion of a larger parcel. *Nishikawa* simply did not address the issues presented in this case.

The PSA in this case is void because it did not contain a description of the property that Riverside now seeks to acquire by specific performance. The parties designation of an escrow agent cannot be used to eviscerate the requirement of the statute of frauds. The PSA is invalid.

**D. A Party Cannot Raise for the First Time on Appeal a New Cause of Action That is Outside the Pleadings.**

A party generally cannot advance on appeal a new cause of action not presented to the trial court.<sup>90</sup> Riverside admits it has never raised mutual mistake or reformation until now.

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<sup>89</sup> 138 Wn. App. at 844-45.

<sup>90</sup> *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 814 P.2d 243 (1991) (contention not made to trial court in consideration of summary judgment motion need not be considered on appeal); *but see* RAP 2.5(a) (a party can raise a ground for affirming a trial court decision which was not presented to the trial court if the record has

Addendum 1 incorporates Exhibit “C” as the legal description of the property.<sup>91</sup> Exhibit “C” is not an adequate description. Riverside alleges this was a mutual mistake and asks the Court to reform the PSA.<sup>92</sup> Riverside admits in footnote 6 that it had not previously addressed reformation in the trial court.<sup>93</sup>

Riverside argues this Court can consider its new theory of mutual mistake under *Plein v. Lackey*.<sup>94</sup> *Plein* does permit an appellate court to consider new theories to uphold a trial court’s ruling on summary judgment, but only if the theories are “within the pleadings and proof.”<sup>95</sup> Mutual mistake and reformation are more than just theories; they are totally new causes of action.

While a party may be able to assert different legal arguments or theories to support their position on appeal, alleging a new cause of action in a Response is certainly outside the bounds of proper appellate procedure. Riverside should not be permitted, at this late date, to seek reformation.

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been sufficiently developed to fairly consider the issue on appeal).

<sup>91</sup> CP 26.

<sup>92</sup> Br. of Resp., pp. 27-28.

<sup>93</sup> Br. of Resp., p. 28, n. 6.

<sup>94</sup> 149 Wn.2d 214, 222, 67 P.3d 1061 (2003).

<sup>95</sup> *Id.*

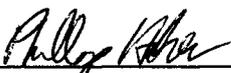
Regardless, even if the Court permits the PSA to be reformed to allow Exhibit A of the 2002 Title Report to be attached, none of the issues raised in this appeal would be affected. The PSA is still invalid because it fails to describe a parcel that was in existence at the time the agreement was signed.

#### IV. CONCLUSION

Grand Ridge hereby requests the Court to overturn and reverse the trial court's decision and order the court to enter summary judgment in favor of Grand Ridge. Grand Ridge further requests recovery of its costs and attorneys' fees as the prevailing party.

Dated this 13<sup>th</sup> day of February 2008.

SCHWABE, WILLIAMSON & WYATT, P.C.

By:   
Bradley W. Andersen, WSBA #20640  
Phillip J. Haberthur, WSBA #38038  
Attorneys for Appellant

**APPENDIX**

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Exhibit "A" to Schedule A of the Commitment for Title Insurance (metes and bounds description) .....	APP-1
Preliminary Plat .....	APP-2
Final Plat .....	APP-3
Revised Exhibit "A" to Schedule A of the Commitment for Title Insurance (Legal Description for Lots 1-20) .....	APP-4

CHICAGO TITLE INSURANCE COMPANY

EXHIBIT 'A'

DESCRIPTION:

ORDER NO: K128398

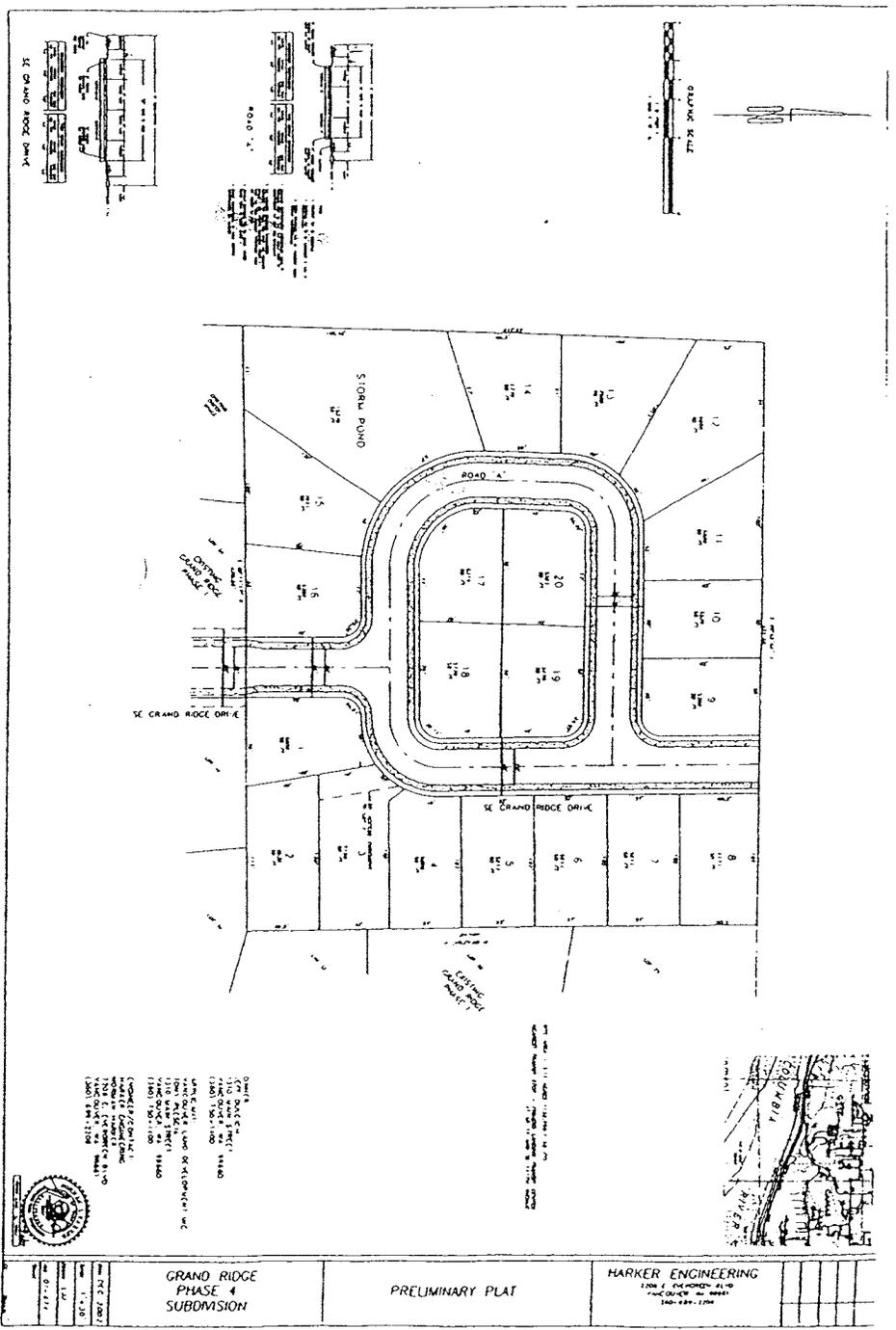
A tract of land in a portion of the North half of Section 8 Township 1 North, Range 3 East of the Willamette Meridian, Clark County, Washington, more particularly described as follows:

BEGINNING at the Northwest corner of Lot 27 of "GRAND RIDGE PHASE 1" according to the plat thereof recorded in Book 310 of Plats, at Page 590 records of Clark County, Washington; thence North 89°45'44" West, along the North line of that certain tract of land conveyed to William D. Robison by deed recorded under Auditor's File No. 9108070193 records of Clark County, Washington, for a distance of 451.49 feet to the Northwest corner thereof; thence South 01°56'30" West, along the West line of the Joel Knight Donation Land Claim, for a distance of 412.92 feet, to the Northwest corner of Tract "E" of said "GRAND RIDGE PHASE 1" plat; thence North 89°11'17" East, along the North line of said Tract "E" and the extension thereof, for a distance of 470.58 feet, to the Southwest corner of Lot 33 of said "GRAND RIDGE PHASE 1" plat; thence North 00°43'04" West, along the West line of said Lot 33 and the extension thereof, for a distance of 404.18 feet to the Point of Beginning.

CCU 000674  
Riverside/Grand Ridge

CP 0760  
Geonerco v Grand Ridge

APP-1



GRAND RIDGE PHASE 4 SUBMISSION  
 PREPARED BY: HARKER ENGINEERING, INC.  
 1110 EAST STREET, SUITE 100  
 CHICAGO, ILLINOIS 60605  
 (773) 424-1100  
 (773) 424-1101  
 (773) 424-1102  
 (773) 424-1103  
 (773) 424-1104  
 (773) 424-1105  
 (773) 424-1106  
 (773) 424-1107  
 (773) 424-1108  
 (773) 424-1109  
 (773) 424-1110  
 (773) 424-1111  
 (773) 424-1112  
 (773) 424-1113  
 (773) 424-1114  
 (773) 424-1115  
 (773) 424-1116  
 (773) 424-1117  
 (773) 424-1118  
 (773) 424-1119  
 (773) 424-1120

GRAND RIDGE PHASE 4 SUBMISSION

PRELIMINARY PLAT

HARKER ENGINEERING  
 1110 EAST STREET, SUITE 100  
 CHICAGO, ILLINOIS 60605  
 (773) 424-1100

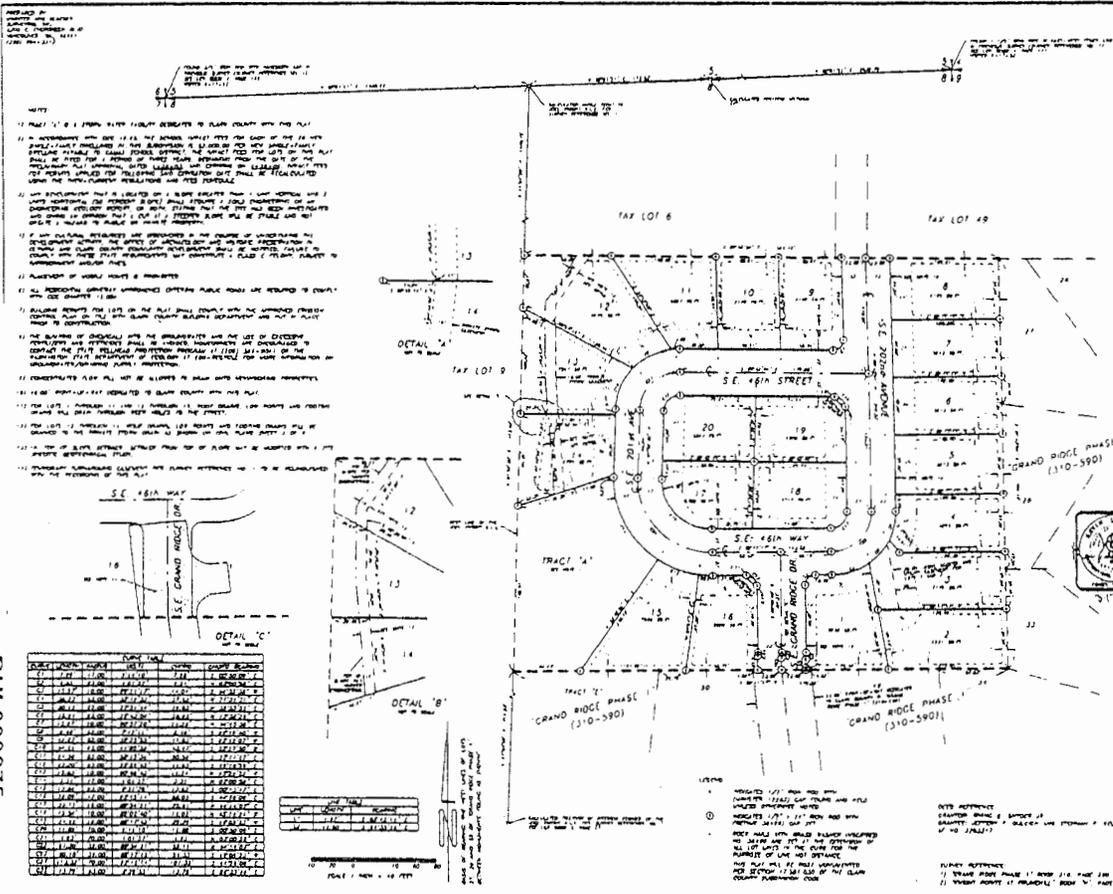
APP-2

CP 0789  
 Geonerc v Grand Ridge

BK 311 Pg 367

### GRAND RIDGE PHASE IV

A SUBDIVISION IN A PORTION OF THE  
JOEL KNIGHT D.L.C. IN A PORTION OF THE  
SE 1/4 OF THE NW 1/4 AND THE SW 1/4  
OF THE NE 1/4 OF SECTION 8  
T. 1 N., R. 3 E., W. 4,  
CLARK COUNTY, WASHINGTON



- 1. ALL LOTS SHALL BE PLANNED TO BE PLANNED WITH THE PLAN...
- 2. ALL LOTS SHALL BE PLANNED TO BE PLANNED WITH THE PLAN...
- 3. ALL LOTS SHALL BE PLANNED TO BE PLANNED WITH THE PLAN...
- 4. ALL LOTS SHALL BE PLANNED TO BE PLANNED WITH THE PLAN...
- 5. ALL LOTS SHALL BE PLANNED TO BE PLANNED WITH THE PLAN...
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- 7. ALL LOTS SHALL BE PLANNED TO BE PLANNED WITH THE PLAN...
- 8. ALL LOTS SHALL BE PLANNED TO BE PLANNED WITH THE PLAN...
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- 17. ALL LOTS SHALL BE PLANNED TO BE PLANNED WITH THE PLAN...
- 18. ALL LOTS SHALL BE PLANNED TO BE PLANNED WITH THE PLAN...
- 19. ALL LOTS SHALL BE PLANNED TO BE PLANNED WITH THE PLAN...
- 20. ALL LOTS SHALL BE PLANNED TO BE PLANNED WITH THE PLAN...
- 21. ALL LOTS SHALL BE PLANNED TO BE PLANNED WITH THE PLAN...
- 22. ALL LOTS SHALL BE PLANNED TO BE PLANNED WITH THE PLAN...
- 23. ALL LOTS SHALL BE PLANNED TO BE PLANNED WITH THE PLAN...
- 24. ALL LOTS SHALL BE PLANNED TO BE PLANNED WITH THE PLAN...

LOT	AREA	PERCENTAGE	AREA	PERCENTAGE	AREA	PERCENTAGE
1	1.00	4.17	1.00	4.17	1.00	4.17
2	1.00	4.17	1.00	4.17	1.00	4.17
3	1.00	4.17	1.00	4.17	1.00	4.17
4	1.00	4.17	1.00	4.17	1.00	4.17
5	1.00	4.17	1.00	4.17	1.00	4.17
6	1.00	4.17	1.00	4.17	1.00	4.17
7	1.00	4.17	1.00	4.17	1.00	4.17
8	1.00	4.17	1.00	4.17	1.00	4.17
9	1.00	4.17	1.00	4.17	1.00	4.17
10	1.00	4.17	1.00	4.17	1.00	4.17
11	1.00	4.17	1.00	4.17	1.00	4.17
12	1.00	4.17	1.00	4.17	1.00	4.17
13	1.00	4.17	1.00	4.17	1.00	4.17
14	1.00	4.17	1.00	4.17	1.00	4.17
15	1.00	4.17	1.00	4.17	1.00	4.17
16	1.00	4.17	1.00	4.17	1.00	4.17
17	1.00	4.17	1.00	4.17	1.00	4.17
18	1.00	4.17	1.00	4.17	1.00	4.17
19	1.00	4.17	1.00	4.17	1.00	4.17
20	1.00	4.17	1.00	4.17	1.00	4.17
21	1.00	4.17	1.00	4.17	1.00	4.17
22	1.00	4.17	1.00	4.17	1.00	4.17
23	1.00	4.17	1.00	4.17	1.00	4.17
24	1.00	4.17	1.00	4.17	1.00	4.17

CLARK COUNTY PLANNING DIRECTOR  
*[Signature]* 1-11-06

CLARK COUNTY ASSESSOR  
*[Signature]* 1-11-06

CLARK COUNTY COMMISSIONERS  
*[Signature]* 1-11-06

CLARK COUNTY ENGINEER  
*[Signature]* 1-11-06

SURVEYOR'S CERTIFICATE  
*[Signature]* 1-11-06

CLARK COUNTY HEALTH DEPARTMENT  
*[Signature]* 1-11-06

AUDITOR'S CERTIFICATE  
*[Signature]* 1-11-06

**UTILITY AND SIDEWALK EASEMENT**  
THE EASEMENT IS GRANTED TO THE OWNER OF THE LOT TO BE SETBACK TO ALL  
FEET FROM THE FRONT BOUNDARY LINE OF THE LOT FOR THE INSTALLATION  
AND MAINTENANCE OF UTILITY LINES AND SIDEWALKS. THE EASEMENT IS GRANTED  
TO THE OWNER OF THE LOT TO BE SETBACK TO ALL FEET FROM THE FRONT  
BOUNDARY LINE OF THE LOT FOR THE INSTALLATION AND MAINTENANCE OF  
UTILITY LINES AND SIDEWALKS.

APP-3

RH11 000975  
Riverside/Grand Ridge

CP 0593  
Geonenco v Grand Ridge

BK 311 Pg 367

Read and Approved By: 

CHICAGO TITLE INSURANCE COMPANY

EXHIBIT 'A'

DESCRIPTION

ORDER NO. K128398 CM

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.

A tract of land in a portion of the North half of Section 8 Township 1 North, Range 3 East of the Willamette Meridian, Clark County, Washington, more particularly described as follows:

BEGINNING at the Northwest corner of Lot 27 of "GRAND RIDGE PHASE 1" according to the plat thereof recorded in Book 310 of Plats, at Page 590 records of Clark County, Washington; thence North 89°45'44" West, along the North line of that certain tract of land conveyed to William D. Robison by deed recorded under Auditor's File No. 9108070193 records of Clark County, Washington, for a distance of 451.49 feet to the Northwest corner thereof, thence South 01°56'30" West, along the West line of the Joel Knight Donation Land Claim, for a distance of 412.92 feet, to the Northwest corner of Tract "E" of said "GRAND RIDGE PHASE 1" plat, thence North 89°11'17" East, along the North line of said Tract "E" and the extension thereof, for a distance of 470.58 feet, to the Southwest corner of Lot 33 of said "GRAND RIDGE PHASE 1" plat; thence North 00°43'04" West, along the West line of said Lot 33 and the extension thereof, for a distance of 404.18 feet to the Point of Beginning.

SUBJECT TO:

1. Notice of the Formation of Local Utility District for Street Lighting;
  - Recorded: January 25, 2006
  - Auditor's File No.: 4116286 and 4134506
  - Local Utility District No.: 1007
  
2. Any unpaid assessments or charges and liability to further assessments or charges, for which a lien may have arisen (or may arise), all as provided for in instrument recorded under
  - Recorded: October 23, 1998
  - Auditor's File No.: 3019955
  - Records of: Clark County, Washington
  - Imposed by: GRANDRIDGE HOMEOWNERS ASSOCIATION INC., a Washington corporation
  - Affects: Said premises and other property 
  - None currently due or owing*
  - Said instrument has been amended or modified by the following instrument:
  - Auditor's File No.: 3220211, 3220212 and 4145732
  
3. Agreement, including its terms, covenants and provisions;
  - Between: ADJACENT PROPERTY OWNERS
  - Dated: March 29, 2006
  - Recorded: March 30, 2006
  - Auditor's File No.: 4145732
  - For: Joint access agreement
  - Affects: Lots 2 and 3

**CERTIFICATE OF FILING**

I hereby certify that on the 13<sup>th</sup> day of February 2008, I caused to be filed the original and one copy of the foregoing APPELLANT'S REPLY BRIEF with the State Court Administrator at this address:

David Ponzoha, Clerk/Administrator  
Court of Appeals, Division II  
950 Broadway  
Suite 300 MS TB-06  
Tacoma, WA 98402-4454

by First Class Mail.



Bradley W. Andersen, WSBA #20640  
Phillip J. Haberthur, WSBA #38038  
Attorneys for Appellant

FILED  
COURT OF APPEALS  
DIVISION II  
08 FEB 15 PM 1:32  
STATE OF WASHINGTON  
BY DEPUTY

**CERTIFICATE OF SERVICE**

I hereby certify that on the 13<sup>th</sup> day of February 2008, I served one correct copy of the foregoing APPELLANT'S REPLY BRIEF by First

Class Mail to:

Bradley Alan Maxa, Esq.  
Gordon Thomas Honeywell  
P.O. Box 1157  
Tacoma, WA 98401-1157  
(Attorney for Respondent)



Bradley W. Andersen, WSBA #20640  
Phillip J. Habertur, WSBA #38038  
Attorneys for Appellant

FILED  
COURT OF APPEALS  
DIVISION II  
08 FEB 15 PM 1:32  
STATE OF WASHINGTON  
DEEDY  
BY