

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

POULSBO GROUP, LLC, *Appellant*

v.

TALON DEVELOPMENT, LLC, *Respondent.*

BRIEF OF RESPONDENT

David P. Horton, WSBA No. 27123
LAW OFFICE OF
DAVID P. HORTON, INC. P.S.
3212 NW Byron Street, Suite 104
Silverdale, WA 98383
(360) 692-9444
(360) 692-1257 Facsimile
Attorney for Respondent

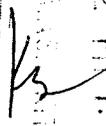
09 AUG 12 PM 1:51
STATE OF WASHINGTON
BY 
DEPUTY
COURT OF APPEALS
DIVISION II

Table of Contents

I.	STATEMENT OF THE ISSUES.....	1
II.	STATEMENT OF THE CASE.....	1
A.	INTRODUCTION	1
B.	FACTS	4
1.	The Plat – Talon Glen.	4
2.	Several options for bringing utilities to the plat.....	5
3.	The city represents repeatedly that there would be no latecomers’ assessments.....	7
4.	The Purchase and Sale Agreement.....	8
5.	The disclosure statement.....	10
6.	The Hearing.....	11
7.	The documents are produced by the engineer.....	12
8.	The Hearing Examiner’s decision identifies the latecomer issue.....	13
9.	Snowberry finally begins the latecomer process.....	14
10.	After Poulsbo Group is told about the decision they ask about the latecomer issue.	15
11.	A week before closing, unbeknownst to the parties, a latecomer application is filed.....	16
III.	ARGUMENT.....	17
A.	TALON DID NOT BREACH ANY CONTRACT TERM – BUT EVEN IF THEY DID POULSBO GROUP’S DAMAGES WERE CAUSED BY THEIR OWN ACTIONS.....	17
1.	The Economic Loss Rule bars the claims.	19
2.	There was no breach of any contract term.	20
3.	There was no breach of the duty of good faith and fair dealing.....	21
4.	Even if there was a breach, Poulsbo Group cannot prove their damages were caused by the breach.....	22
5.	The failure to assess feasibility caused Poulsbo Group’s damages.....	23
6.	Foreseeability also bars the claims.....	27
7.	Poulsbo Group waived their rights under the contract.....	28
B.	POULSBO GROUP’S FRAUD CLAIM IS BARRED BY THE ECONOMIC LOSS RULE.....	28

C. EVEN IF NOT BARRED, POULSBO GROUP'S FRAUD CLAIMS FAIL.	31
1. No <i>existing</i> fact was falsely represented.	31
2. The speaker had no knowledge that the statement was false.	33
3. Poulsbo Group could not rely solely on the representations.	34
D. THE MERGER DOCTRINE BARS POULSBO GROUP'S CLAIMS.	37
E. FACTUAL ISSUES PRECLUDE SUMMARY JUDGMENT BEING GRANTED FOR POULSBO GROUP.	38
IV. ATTORNEY'S FEES	40
V. CONCLUSION.....	41

TABLE OF AUTHORITIES

Washington State Cases

<i>Alejandre v. Bull</i> , 159 Wn.2d 674, 153 P.3d 864 (2007).....	19, 20, 28, 29, 30, 34, 35, 36, 37
<i>Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Development Co.</i> , 115 Wn.2d 506, 525, 799 P.2d 250, 261 (1990).....	36
<i>Barber v. Peringer</i> , 75 Wn.App. 248, 877 P.2d 223 (1994).....	37, 40, 41
<i>Bayo v Davis</i> , 127 Wn. 2d 256, 897 P.2d 1239 (1995).....	40
<i>Carlile v. Harbour Homes, Inc.</i> , 147 Wn.App 193, 194 P.3d 280 (2008)	4, 22, 28, 29, 30
<i>Cox v. O'Brien</i> , 150 Wn.App. 24, 206 P.3d 682 (2009).....	29, 30
<i>Failes v. Lichten</i> , 109 Wn.App. 550, 555, 37 P.3d 301, 303 (2001).....	40
<i>Felt v. McCarthy</i> , 130 Wn.2d 203, 922 P.2d 90 (1996).....	25, 26
<i>Jackowski v. Borchelt</i> , 209 P.3d 514 (2009).....	30
<i>Kwiatkowski v. Drews</i> , 142 Wn.App. 463, 176 P.3d 510 (2008).....	34, 35
<i>Lawyers Title Ins. Corp. v. Baik</i> , 147 Wn.2d 536, 545, 55 P.3d 619 (2002).....	35
<i>Peoples Nat'l Bank v. National Bank of Commerce</i> , 69 Wn.2d 682, 420 P.2d 208 (1966).....	38
<i>Puget Sound Service Corp. v. Dalarna Management Corp.</i> , 51 Wn.App. 209, 214, 752 P.2d 1353,1356 (1988).....	35, 36
<i>Rauth v. Evans</i> , 138 Wn.App. 834, 158 P.3d 1261 (2007).....	32
<i>Ross v. Ticor Title Ins. Co.</i> , 135 Wn.App. 182, 143 P.3d 885, 888 (2006)	41
<i>Ross v. Kirner</i> , 162 Wash.2d 493, 172 P.3d 701 (2007).....	41
<i>Scott v. Petit</i> , 63 Wn.App. 50, 816 P.2d 1229 (1991).....	24, 25

<i>Sloan v. Thompson</i> , 128 Wn.App. 776, 785, 115 P.3d 1009, 1013 (2005).....	36
<i>Snyder v. Roberts</i> , 45 Wn.2d 865, 871, 278 P.2d 348 (1955).....	37
<i>Sorenson v. Pyeatt</i> , 158 Wn.2d 523, 538-39, 146 P.3d 1172 (2006).....	35
<i>Steinke v. v. Russi</i> , 145 Wn.App 544, 190 P.3d 60 (2008).....	29
<i>Tacoma Northpark, LLC v. NW, LLC</i> , 123 Wn.App. 73, 96 P.3d 454 (2004).....	40
<i>Van Dinter v. Orr</i> , 157 Wn.2d 329, 333, 138 P.3d 608 (2006).....	35
<i>W. Coast, Inc. v. Snohomish County</i> , 112 Wn.App. 200, 48 P.3d 997 (2002).....	35
<i>Williams v. Joslin</i> , 65 Wash.2d 696, 399 P.2d 308 (1965).....	31, 34, 35
Statutes and Court Rules	
RCW 4.84.330.....	40
RCW 35.72.....	7
RCW 64.04.030.....	38
RAP 18.1.....	40
Other Sources	
Wash. Pattern Jury Instruction – Civil 303.01.....	27
Appendix	
Appendix A.....	CP 280-282

I. STATEMENT OF THE ISSUES

- A. When a contract prohibits a buyer from relying on oral representations can the buyer later claim a breach of contract based on oral representations?
- B. When a buyer is required to exercise due diligence under a feasibility clause and fails to do so, can the buyer later claim damages resulting from not having information they would have had if they performed the diligence required by the contract?
- C. Did Talon breach the contract?
- D. Can Poulsbo Group establish damages caused by the alleged breach?
- E. Did the allegedly breached contract terms merge into the deed?
- F. Does the economic loss rule bar a claim for fraud?
- G. Did Poulsbo Group produce sufficient evidence of fraud?

II. STATEMENT OF THE CASE

A. INTRODUCTION

Poulsbo Group knew there were going to be development costs when they purchased the plat from Talon. It was up to them to determine whether the costs made the development feasible. After they closed, their

costs went up because a latecomer assessment was recorded. They blame Talon.

But Talon believed there was not going to be a latecomers' assessment because the city told them there would not be – repeatedly – in writing. Talon passed this information to Poulsbo Group. If Poulsbo Group conducted an adequate feasibility study as required by the contract they would have reviewed the Hearing Examiner's decision which addressed the issue. Had they then inquired with the city they would have discovered that one might be imposed. As such they cannot claim damages.

Four undisputed facts dictate that the trial court should be affirmed.

1. A typed addendum permitted Poulsbo Group to terminate the agreement if they did not subjectively approve the Hearing Examiner's decision.
2. The city's Hearing Examiner issued a decision which identified the latecomer issue.
3. Poulsbo Group knew the Hearing Examiner's decision was available, but did not obtain a copy.
4. After the Hearing Examiner's decision, Poulsbo Group inquired with Talon's engineer regarding latecomer

assessments and relied on the engineer's oral representation (a reliance specifically prohibited by the contract) instead of inquiring with the city (an inquiry required by the contract).

Poulsbo Group claims three emails about development costs (not latecomers' assessments) would have alerted them to the issue – and the failure to provide those breached the contract. But had they exercised due diligence as required by the contract they would have been alerted.

Poulsbo Group alleges an increase in development costs. But the contract allocated this risk to them. They cannot now claim damages when they ignored available information. The feasibility contingency required them to conduct a diligent inquiry regarding development costs. They admit that they did not inquire regarding this issue with the city – instead they relied on oral representations from Craig Deaver, the civil engineer who originally worked for Talon, then went to work for Poulsbo Group.¹

Their “bad faith” and “misrepresentation” allegations are not supported by the undisputed facts that (1) the city told Talon and their engineer there would be no latecomers' assessment imposed;² (2) Talon directed their engineer to cooperate with Poulsbo Group in doing their

¹ CP 44; 188.

² CP 198; 201; 203.

feasibility study;³ (3) Poulsbo Group would have identified the problem if they had conducted a diligent feasibility study including reviewing the Hearing Examiner's decision;⁴ and 4) Talon believed their engineer gave a copy to Poulsbo Group.⁵ But Poulsbo Group failed to review this document even though it was a requirement for closing.⁶

Additionally, the merger and foreseeability doctrines bar their claims. Finally, their fraud claim is barred by case law⁷ and factually deficient (they cannot produce any evidence to support several elements). Every representation made was true at the time it was made.

Poulsbo Group tries to circumvent these obstacles by placing facts out of context, and confusing the issues with facts not relevant to any claim or defense.

B. FACTS

1. The Plat – Talon Glen.

Talon Development, LLC owned and was a plat in the City of Poulsbo called Talon Glen.⁸ The plat was adjacent to several other plats in

³ CP 198.

⁴ CP 44; 148; 155.

⁵ CP 307.

⁶ CP 341; 361-362.

⁷ *Carlile v. Harbour Homes, Inc.*, 147 Wn.App 193, 198, 194 P.3d 280 (2008)(*Review granted in part* by 210 P.3d 1019 (July 8, 2009)).

⁸ CP 197.

various stages of development.⁹ One, Snowberry,¹⁰ was further along in the process.¹¹

Talon hired a civil engineer, Craig Deaver, to design the plat and get government permits and approvals. Mr. Deaver was Talon's primary contact with the city.¹²

2. Several options for bringing utilities to the plat.

Talon knew they would have to bring in water and sewer. For this, they relied on their engineer's expertise. Mr. Deaver believed there were several ways to bring water and sewer to the development.

- a. Connect to the adjacent Snowberry development, and pay them directly for that option;
- b. Connect to services installed by Snowberry after dedication to the city and pay the city's normal connection charges;
- c. Connect to city services in another location; or
- d. Connect to another development then in progress.¹³

⁹ CP 197-198.

¹⁰ The Snowberry Plat was being developed by Snowberry Enterprises, LLC.

¹¹ CP 197-198; 200-201.

¹² CP 200; 202.

¹³ CP 200.

Because connecting to the Snowberry Development seemed to make the most sense, Talon began negotiating with Snowberry's representative, Holly White, about the costs they would incur.¹⁴

As admitted by Poulsbo Group:

... [D]uring the course of development of Talon Glen, [Craig Deaver] approached Snowberry to coordinate installation of utilities and street improvements. Snowberry and [Talon] were unable to come to an agreement regarding the installation of improvements. There were many factors as to why an agreement could not be reached. First, Snowberry was in a hurry to achieve plan approval and felt that this could possibly delay their approval/construction and that it was going to pursue its own timetable. In addition the costs of the improvements the Snowberry developer was seeking appeared to be excessive to [Talon].¹⁵

It was three emails exchanged during these negotiations that Poulsbo Group now complains about. These negotiations ended because, based on the amount Snowberry wanted for the improvements, Mr. Deaver believed they could get water and sewer to the plat for less.¹⁶

¹⁴ CP 198; 201; 280-283.

¹⁵ CP 46-47.

¹⁶ CP 198; 201.

3. The city represents repeatedly that there would be no latecomers' assessments.

A latecomers' assessment results from a city and developer entering into a latecomers' agreement under RCW 35.72. A latecomers' agreement is between a developer (in this case Snowberry) and a municipality (City of Poulsbo) where the developer builds infrastructure such as streets, sidewalks, water, and utilities. In exchange, the city records an assessment against properties that benefit from the improvements.

The city told Mr. Deaver there would be no latecomers' assessment imposed on Talon Glen.¹⁷ A memorandum generated by the city as part of the pre-application packet said "**LID & LATE COMER AGREEMENTS: None**"¹⁸

Later in the city's Staff Report to the Hearing Examiner they state that the plat will be served by the City of Poulsbo for water and sewer, but does not mention any latecomer assessments. In fact, it states "LID and Delayed Benefit Assessments: NONE."¹⁹

Based on the way the Snowberry and Talon projects were progressing, Craig Deaver's experience with other jurisdictions, and the

¹⁷ CP 201.

¹⁸ CP 48.

¹⁹ CP 104. (A latecomers' assessment is a delayed benefit assessment).

city's assurances, Talon did not believe a latecomers' assessment would be imposed. Mr. Deaver communicated this to Talon's members, Mr. Dubois and Mr. Smith.²⁰ Usually if a developer (like Snowberry) was going to request a latecomers' agreement, they would do so early in the process. But Snowberry had not made an application.²¹ Snowberry installed their improvements before requesting a latecomers' agreement.²²

4. The Purchase and Sale Agreement.

In January 2007, Talon agreed to sell the plat to Poulsbo Group.²³ Poulsbo Group's principal is John Jack. Mr. Jack represented himself to be a sophisticated real estate developer who had developed (and was developing) many plats in the Seattle area.²⁴

The contract was fully integrated:

This Agreement constitutes the entire understanding between the parties and supersedes all prior or contemporaneous understandings or representations. No modification of this Agreement shall be effective unless agreed to in writing and signed by the Buyer and Seller.²⁵

²⁰ CP 198; 201-203.

²¹ CP 201.

²² CP 57.

²³ CP 334. The purchase and sale agreement was between Talon Development, LLC and JNM Construction Services, Inc. Prior to closing the contract was assigned by JNM to the Poulsbo Group, LLC.

²⁴ CP 200; 203-204.

²⁵ CP 332; 336.

It had a feasibility contingency giving the buyer time to evaluate development costs. It provided:

BUYER SHOULD NOT RELY ON ANY ORAL STATEMENTS concerning feasibility made by the Seller....Buyer should inquire at the city or county, and water, sewer or other special districts in which the Property is located. Buyer's inquiry shall include, but not be limited to...sufficient water, sewer and utility and any other services connection charges; and all other charges that must be paid.²⁶

Talon Development agreed to provide documents related to the property including:

1. Soil reports
2. Environmental Studies
3. Alta Survey
4. Traffic Study
5. All meeting notes and memorandums related to the property
6. All engineering documents²⁷

Talon tasked their engineer, Mr. Deaver, with providing the documents.²⁸ Mr. Deaver did so.²⁹

²⁶ CP 332; 342; 337 (Emphasis in original).

²⁷ CP 332; 341.

²⁸ CP 200.

²⁹ CP 202.

5. The disclosure statement.

On January 19, 2007 in conjunction with the agreement, Talon provided a vacant land disclosure statement. The disclosure was limited to seller's actual knowledge at the time the disclosure was made:

SELLER MAKES THE FOLLOWING
DISCLOSURE...BASED ON SELLER'S
ACTUAL KNOWLEDGE OF THE
PROPERTY AT THE TIME SELLER
COMPLETES THIS DISCLOSURE
STATEMENT. SELLER MAKES THIS
DISCLOSURE WITH THE
UNDERSTANDING BUYER WILL NOT
RELY ON IT TO LIMIT BUYER'S
INVESTIGATION OF THE PROPERTY.

...³⁰

Relevant here, they answered "no" to the question: "[A]re there any pending or existing assessments against the Property?"³¹ Talon's response was true. Snowberry had not yet been applied for the latecomers' agreement. The application was not submitted until February 23, 2007.³²

The disclosure continued:

THIS DISCLOSURE IS NOT A
SUBSTITUTE FOR YOUR OWN
INVESTIGATION OF THE PROPERTY.
YOU ARE ADVISED TO OBTAIN THE

³⁰ Id. (Emphasis on original).

³¹ Id. (Emphasis in original).

³² CP 352.

SERVICES OF QUALIFIED EXPERTS
TO CONDUCT A COMPREHENSIVE
INSPECTION AND EVALUATION OF
THE PROPERTY.³³

Mr. Jack signed the acknowledgement on the form that said:

Buyer has a duty to pay diligent attention to any material defects that are known to Buyer or can be known to Buyer by utilizing diligent attention and observation.³⁴

6. The Hearing

On the same day Talon signed the seller's disclosure form, the city's Hearing Examiner held a public hearing to evaluate, and decide on, the approval and conditions for the preliminary plat. Poulsbo Group asserts a certain sequence to three events that day. They claim that first the parties signed the agreement. Next, they claim, the hearing occurred. And third, they state, the disclosure was completed. But there is no indication in the record which event came first – the disclosure signing, the contract, or the hearing. As such there is no evidence the hearing occurred prior to the disclosure being completed.

³³ CP 78.

³⁴ CP 79.

At the hearing Snowberry raises, for the first time, the latecomer issue.³⁵ Snowberry's representative asks that the Hearing Examiner make a latecomers' agreement a condition for plat approval.³⁶

A city representative testified that the city did not have any written policy or ordinance regarding latecomers' assessments, but adhered to the RCW's and left it up to the developer to initiate.³⁷ The Hearing Examiner then stated that "...I'm going to leave it to the developers to have that discussion, if they choose to have it...."³⁸

7. The documents are produced by the engineer.

Next, on January 22, 2007 Talon provided documents to Poulsbo Group. Mr. Jack testified:

In the Purchase and Sale Agreement, the seller was to provide all documents relative to that particular project; and a company named CES Engineering provided all those legal documents, or all the documents relevant to that project.³⁹

Accordingly, Talon believed in good faith that their engineer provided the documents, and that Poulsbo Group was satisfied. The contract did not require a continuing duty to disclose.

³⁵ CP 132.

³⁶ CP 134.

³⁷ CP 143.

³⁸ Id.

³⁹ CP 355.

Among the documents provided was a Staff Report recommending conditions of approval. It says, in part:

Utility Service for the noted property is subject to application and payment of the applicable fees and assessments.⁴⁰

Utility assessments were required. The only question left open was how much.

8. **The Hearing Examiner's decision identifies the latecomer issue.**

The Hearing Examiner's decision issued on February 1, 2007 acknowledged Snowberry's claim:

[Ms. White] testified that, pursuant to the code, she does not believe connectivity to water and sewer should be allowed without a Latecomer Agreement to share costs....⁴¹

Ms. White stated that the proposed conditions would address most of her concerns, but that she continued to be concerned about a Latecomer Agreement.⁴²

The decision goes on to state that "...it is up to the developers to privately reach an agreement."⁴³ The decision denies Snowberry's request that a latecomers' assessment be imposed.⁴⁴ No condition of the

⁴⁰ CP 104.

⁴¹ CP 155.

⁴² Id.

⁴³ Id.

⁴⁴ CP 148; 169.

preliminary plat approval mentions a requirement to pay a latecomers' assessment.⁴⁵

Closing was conditioned on Poulsbo Group's subjective review of the decision. An addendum typed in addition to the contract's boilerplate language stated:

Seller to provide plat approval before the expiration of the feasibility study. If final plat approval is not complete the feasibility time period shall extend to a period of 5 days after final plat approval is delivered to purchaser. If plat approval is subjectively unsatisfactory to purchaser, then purchaser has the option to terminate this agreement.⁴⁶

Accordingly, under the contract Poulsbo Group had a right to review plat approval (which mentioned Snowberry's claims) before closing. Upon review, Poulsbo Group had the right to terminate the contract. No reasonable developer would have closed without reviewing the decision.⁴⁷

9. Snowberry finally begins the latecomer process.

Snowberry's representative sent an email to the city on February 5, 2007 pointing out how testimony was mischaracterized in the Hearing

⁴⁵ CP 148-169.

⁴⁶ CP 341.

⁴⁷ CP 326.

Examiner's findings.⁴⁸ The city acknowledged that the Hearing Examiner misstated testimony but did nothing to correct the error. They e-mailed Snowberry's representative that the error had "no effect" on the decision and that a memo would be placed in the file clarifying that issue. These e-mails and memo were not provided to Talon.⁴⁹

On February 9, 2007 in an e-mail response to a phone call, the city suggested Ms. White submit a latecomers' application.⁵⁰ Talon was not informed about the phone call, or the fact that the city had advised Snowberry to file a latecomers' application.⁵¹

10. After Poulsbo Group is told about the decision they ask about the latecomer issue.

On February 13, 2007 the engineer informed Poulsbo Group that the decision had issued.⁵²

Two days later Mr. Jack asked about the latecomers' assessment and was assured orally by the engineer that there would be no latecomers' assessment:

“[O]n February 15, 2007, John Jack, on behalf of the Poulsbo Group, had a meeting with Defendant's design engineers, C.E.S. NW, Inc. to discuss final drawings and other

⁴⁸ CP 171-172.

⁴⁹ CP 171.

⁵⁰ Id.

⁵¹ CP 199; 204.

⁵² CP 325; 327.

related items on the Property and its development. The subject of latecomers' fees was specifically raised at that meeting, and Poulsbo Group was again told, this time by Defendant's engineers C.E.S. NW, Inc. (Craig Deaver), that no latecomers' fees were being assessed against this property."⁵³

Mr. Jack admits he inquired with the engineer about latecomer fees "because he needed substantiation" on the issue.⁵⁴

11. A week before closing, unbeknownst to the parties, a latecomer application is filed.

On February 23, 2007 the city received Snowberry's latecomer application.⁵⁵ After February 26, 2007 Mr. Deaver worked directly for Poulsbo Group.⁵⁶ That is, the engineer that represented Talon throughout this process was now working for Poulsbo Group. Not only did Talon turn over their documents – they turned over their engineer.

Prior to closing Poulsbo Group did little to assess development costs. The contract required them to inquire with the city regarding utility assessments. But they did not inquire with the city.⁵⁷ Mr. Jack simply

⁵³ CP 189.

⁵⁴ CP 365.

⁵⁵ CP 352.

⁵⁶ CP 351.

⁵⁷ CP 358-360.

looked on the internet.⁵⁸ He did not call or write to the city and inquire.⁵⁹ He met with city personnel, but did not inquire.⁶⁰

On March 30, 2007 the transaction closed.⁶¹ A latecomers' assessment was later recorded against the property.

III. ARGUMENT

A. TALON DID NOT BREACH ANY CONTRACT TERM – BUT EVEN IF THEY DID POULSBO GROUP'S DAMAGES WERE CAUSED BY THEIR OWN ACTIONS.

Poulsbo Group attempts to couch a negligent misrepresentation claim as one sounding in contract because their actual claim is barred by the economic loss rule. They attach undue significance to three emails that discuss development costs – and thus tangentially relate to latecomer fees -- but ignore their obligation under the contract to conduct a feasibility study. If they had conducted a diligent study they would have discovered the latecomer issue. It was identified in the Hearing Examiner's decision.

Poulsbo Group states that Talon had an obligation to provide certain documents related to the project. This is correct. But Mr. Jack

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ CP 173-174.

admitted documents were provided.⁶² Indeed, Talon directed their engineer to provide the documents and believed he did so. As such there is no “bad faith.”

The three emails cannot lead to liability for three reasons. First, the contract did not require that every piece of paper related to possible development costs be turned over. (Poulsbo Group also complains that telephone calls regarding this same issue were not revealed⁶³ – but there was no duty to reveal them). Second, these emails do not disclose the latecomer issue – they simply talk about possible development costs. Poulsbo Group was required to investigate development costs independently. Third, even if the emails would have alerted Poulsbo Group to an issue – this did not lead to damages. Poulsbo Group was already alerted to the issue because they asked about the latecomer issue at least twice.

But instead of pursuing the inquiry further with the city (as required by the contract) they relied on oral representations. This, despite the fact that the contract required them to assess feasibility independently and not rely on oral representations. If they inquired with the city prior to closing they would have learned about the Hearing Examiner’s decision

⁶² CP 355.

⁶³ Opening Brief of Appellant at 5.

and the latecomer application filed just weeks before closing. As such, the three emails did not cause any damage.

Finally, any breach was waived because Poulsbo Group had a right to inspect the Hearing Examiner's decision (which discussed the issue) but they failed to do so prior to closing. They bore the risk.

1. The Economic Loss Rule bars the claims.

The economic loss rule bars claims for negligent misrepresentation arising from a contract.⁶⁴ Here, the contract had a feasibility contingency. It placed an affirmative duty on Poulsbo Group to conduct its own investigation. Instead, they relied on Talon's engineer. Poulsbo Group attempts to characterize their negligent misrepresentation claim as a breach of contract. But "[i]f the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims."⁶⁵

Poulsbo Group's claimed losses are purely economic losses and therefore barred. As cited by Poulsbo Group:

Where economic losses occur, recovery is confined to contract "to ensure that the allocation of risk and the determination of

⁶⁴ *Alejandro v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007).

⁶⁵ *Id* at 683.

potential future liability is based on what the parties bargained for in the contract....⁶⁶

The contract allocates the risk at issue to Poulsbo Group in at least two places – the feasibility clause and the clause giving them the right to review and reject plat approval.

To circumvent the argument that the feasibility clause allocates the risk of development costs to them, Poulsbo Group argued:

Talon overstates the significance of [the feasibility clause]. It states only that “buyer should not rely on any oral statements.”⁶⁷

But the clause is a comprehensive risk shifting mechanism placing the burden on evaluating development costs squarely on the buyer.

Here, the rule applies and the claims are barred. As will be discussed later, these clauses also destroy Poulsbo Group’s claims because any claimed reliance on representations was not reasonable.

2. There was no breach of any contract term.

Here, the only substantive contract term allegedly breached is the obligation to provide documents. There is no term in the contract requiring Talon had to disclose every document and all its knowledge regarding the project, or correct representations that are later proven

⁶⁶ CP 213, *quoting Alexandre v. Bull*, 159 Wn.2d 674, 682-83, 153 P.3d 864 (2007) .

⁶⁷ CP 215.

inaccurate. Poulsbo Group's entire contract claim is based on these three innocuous emails.⁶⁸

These emails do not discuss latecomer agreements or assessments. They do not discuss claims asserted by Snowberry. They discuss potentially sharing development costs. Taken in context these emails were part of Talon's investigation into several different ways to bring utilities to the plat. Several options were being explored when those emails were written.⁶⁹ Poulsbo Group was required to assess development costs on its own and not rely on Talon.

Poulsbo Group knew there would be costs and assessments involving with bringing utilities to the plat.⁷⁰ They were required to assess these costs independently.

3. There was no breach of the duty of good faith and fair dealing.

Poulsbo Group's related claim regarding good faith and fair dealing cannot succeed because Talon did not act in bad faith. Their representations were true – they did not believe a latecomer assessment would be imposed because that is what the city told them – repeatedly -- in writing.

⁶⁸ Opening Brief of Appellant at 13; CP 280-282. (Attached as an Appendix to this brief).

⁶⁹ CP 200-201.

⁷⁰ CP 155.

Any documents not provided were inadvertent – the engineer was directed to provide all documents to Poulsbo Group. The duty of good faith is narrow:

This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. But the duty of good faith does not “inject substantive terms into the parties’ contract.” Rather, “it requires only that the parties perform in good faith the obligations imposed by their agreement.” The supreme court has “consistently held there is no ‘free-floating’ duty of good faith and fair dealing that is unattached to an existing contract.” The duty exists only in relation to performance of a specific contract term.⁷¹

Because Talon directed their engineer to provide the documents (including the Hearing Examiner’s decision which identified the issue), there is no breach of good faith and fair dealing.

4. Even if there was a breach, Poulsbo Group cannot prove their damages were caused by the breach.

If the failure to provide the three emails was a breach, Poulsbo Group cannot prove proximate cause. That is, they cannot establish that but for not being provided the emails they would have discovered the latecomer issue.

⁷¹ *Carlile*, 194 P.3d 291.

We know this because despite not being provided these three emails, they were aware of the issue. They asked about it at least twice. And they relied on oral assurances instead of doing their own investigation.

Additionally, the three emails become irrelevant because the Hearing Examiner's decision revealed the issue. Not providing the decision cannot be "bad faith" because: 1) Talon thought their engineer provided it;⁷² 2) the engineer informed Poulsbo Group that the decision issued;⁷³ and 3) Poulsbo Group had a right under the contract to receive and review the decision and back out of the contract if they subjectively disapproved. But they closed without reviewing it.

5. The failure to assess feasibility caused Poulsbo Group's damages.

The contract required Poulsbo Group to conduct a diligent feasibility study including: inquiring with the city; reviewing the Hearing Examiner's decision; and not relying on oral representations.⁷⁴ Because they failed on all three counts, they cannot blame Talon for their higher than expected development costs. They cannot prove that they had a right to rely or that their reliance was reasonable.

⁷² CP 198.

⁷³ CP 325; 327.

⁷⁴ Id.

The feasibility clause required them to do what they admit they failed to do. It says:

- Buyer should inquire at the city or county, and water, sewer or other special districts in which the Property is located.
- Buyer's inquiry shall include, but not be limited to...sufficient water, sewer and utility and any other services connection charges; and all other charges that must be paid.⁷⁵

Mr. Jack admits he did not inquire.⁷⁶ This is dispositive. When a party assumes risk in a transaction and it closes, that party cannot claim damages resulting from that risk. In *Scott v. Petit*⁷⁷ plaintiff, the purchaser, brought a contract claim based on an allegation that the seller misrepresented the property's suitability for a particular use. The court stated:

The contingency clause gave Scott 90 days in which to make a determination as to the physical and practical feasibility of using the subject real property for industrial development. Scott's claim of commercial frustration is based upon difficulties which developed in respect to obtaining the necessary permits for industrial development of the property. This is precisely the risk that was the subject of the contingency clause. The trial court correctly ruled as a matter of

⁷⁵ CP 337; 342.

⁷⁶ CP 358-360.

⁷⁷ 63 Wn.App. 50, 60, 816 P.2d 1229, 1236 (1991).

law that the purchase and sale agreement allocated that risk to Scott. Accordingly, he has no claim of frustration of purpose.⁷⁸

Here, the feasibility clause gave Poulsbo Group time to make a determination as to the practical feasibility of using the property for development. They now claim the development costs were too high based on the assessments for utilities. This is precisely the risk allocated to them in the contract.

The *Scott* court noted that:

The contingency clause gave Scott, in his sole discretion, the right to withdraw from the transaction if the deadline was reached and he was not satisfied with the feasibility of using the property for his intended use of industrial development.

The clear allocation of this risk to Scott defeats, as a matter of law, his claim of mutual mistake.⁷⁹

Here, the feasibility clause, and the clause regarding plat approval gave Poulsbo Group the right to cancel the transaction. They did not review plat approval and went forward. Because they went forward they assumed the risk.

A similar claim was made, with similar result, in *Felt v. McCarthy*.⁸⁰ In that case plaintiffs claimed frustration of purpose because

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ 130 Wn.2d 203, 209-210, 922 P.2d 90, 93 (1996).

they could not develop the property as they wished. Because the risk was borne by the buyer, the Supreme Court rejected the claim:

Once the sales contract closed, McCarthy, as the new owner of the property, implicitly assumed all risks that his planned use of the property would become frustrated due to any future occurrence, whether or not the occurrence was foreseeable....

McCarthy drafted the sales contract for his purchase of the Felt property. If he wanted the real estate deal to be conditioned upon his successful development of a business park, he clearly had the power to include that condition in the contract. However, McCarthy failed to assign any risk of his business park failure to the Felts, and this court should not correct his mistake by using the frustration doctrine to implicitly read such an assignment into the sales contract.⁸¹

Here development cost risks were allocated to Poulsbo Group. They cannot claim development costs as damages. While these cases are not directly on point, the principles stated apply – when a party bears the risk of development costs and fails to properly assess those costs he cannot seek relief from the seller.

Poulsbo Group asserts that one who undermines a feasibility study cannot use it as a shield.⁸² But Talon did not undermine the feasibility study. Talon provided documents. Talon made their engineer available. Talon informed them the Hearing Examiner's decision was available.

⁸¹ *Id.*

⁸² Opening Brief of Appellant at 19-20.

Poulsbo Group did not inquire with the city. Poulsbo Group did not review the decision. And Poulsbo Group did not hire its own engineer.

Further, even ignoring Poulsbo Group's duty to inquire, and ignoring any alleged lack of candor by Talon, Poulsbo Group somehow knew there was a latecomer issue. They asked about it. But instead of checking with the city as required by the contract, they relied on Mr. Deaver's oral representations

6. Foreseeability also bars the claims.

Contract damages are limited by the concept of foreseeability.⁸³ Actual damages are recoverable for a breach of contract to the extent the losses were reasonably foreseeable, at the time the contract was made, as a probable result of the breach.⁸⁴

A loss may be foreseeable as a probable result of a breach because it follows from the breach either in the ordinary course of events, or as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.⁸⁵

Here, it could not be reasonably foreseen that not providing three emails about sewer line cost estimates would lead to damages from a latecomer agreement. This is especially true because the Hearing Examiner's decision disclosed even more information – making the emails irrelevant. The failure to provide these emails cannot lead to damages.

⁸³ WPI 303.01

⁸⁴ Id.

⁸⁵ Id.

7. Poulsbo Group waived their rights under the contract.

The contract required Talon to provide Poulsbo Group with plat approval prior to closing. This document revealed the issue. Mr. Jack testified that this was not provided, but he went forward with closing anyway.⁸⁶

Mr. Jack minimized the importance of reviewing the decision prior to closing.⁸⁷ But if the document was irrelevant for Poulsbo Group, why was their subjective review and approval of the decision a condition of closing?

Because Poulsbo Group did not insist on being provided the one document that would have informed them of their mistaken impression, and closed the transaction, they waived any claim related to not being informed.

B. POULSBO GROUP'S FRAUD CLAIM IS BARRED BY THE ECONOMIC LOSS RULE.

The *Alejandre* Court did not decide whether fraud claims are barred by the economic loss rule.⁸⁸ But in *Carlile v. Harbour Homes, Inc.*, the

⁸⁶ CP 361-366.

⁸⁷ Id.

⁸⁸ *Alejandre* at 689,690 (“We need not address the question whether any or all fraudulent representation claims should be foreclosed by the

Court of Appeals, Division One held that the economic loss rule bars fraud claims.⁸⁹ The *Carlile* Court found that “there is no reason to conclude that an intentional misrepresentation claim should be treated the same as the fraudulent concealment claim in *Alejandre*.”⁹⁰ That is, an intentional misrepresentation claim is not exempt from “the general exclusion of tort-based claims under the rationale of the economic loss rule.”⁹¹

This Court recently followed the *Carlile* Court in *Cox v. O’Brien*.⁹² The *Cox* Court noted that Division One based their decision on the conclusion that “*Carlile* had failed to provide a legal basis for his argument that fraud claims fall outside the economic loss rule....”⁹³ Likewise, Poulsbo Group did not provide any reason that the contract’s risk allocation should be ignored in favor of their fraud claim.

No case cited by Poulsbo Group conflicts with *Carlile*. Unlike the cases cited by Poulsbo Group, the *Cox* Court specifically adopted the *Carlile* Court’s reasoning and holding – that the economic loss rule bars fraud claims. In *Steinke v. v. Russi*⁹⁴ the Court held the trial court did not

economic loss rule because we resolve the *Alejandres*’ fraudulent representation claims on other grounds.”).

⁸⁹ 147 Wn.App 193, 198, 194 P.3d 280.

⁹⁰ *Id* at 205.

⁹¹ *Id*.

⁹² 150 Wn.App. 24, 206 P.3d 682 (2009).

⁹³ *Id* at 35.

⁹⁴ 145 Wn.App 544, 190 P.3d 60 (2008).

make the necessary findings for fraud and so it did not reach that issue. The Court did not discuss whether the economic loss rule applied or not.

Poulsbo Group also cites to *Jackowski v. Borchelt*⁹⁵ for the proposition that this Court has held the economic loss rule does not apply to fraud claims. In that case this Court stated that “[b]ecause the Jackowskis' fraud and fraudulent concealment claims fall outside the scope of the economic loss rule, we will address them briefly.” This Court cites *Alejandre* for this proposition. But the *Alejandre* court did not address whether the economic loss rule forecloses fraudulent representation claims because it resolved the issue before it on lack of substantial evidence of fraud.⁹⁶

The only time this court directly addressed this issue it adopted the reasoning in *Carlile* and should do so here. The economic loss rule’s purpose is to allow parties to allocate risk by contract. Here the contract places the risk of higher development cost generally, and assessments specifically, on the buyer. This is a textbook case for the economic loss rule. But even if the fraud claims are not barred by the economic loss rule, they cannot establish the elements of the claim.

⁹⁵ 209 P.3d 514 (2009).

⁹⁶ 159 Wn.2d at 690 n. 6.

C. EVEN IF NOT BARRED, POULSBO GROUP'S FRAUD CLAIMS FAIL.

It is well settled that the plaintiff must plead, and the evidence must show, the following elements:

- (1) A representation of an existing fact;
- (2) Its materiality;
- (3) Its falsity;
- (4) The speaker's knowledge of its falsity;
- (5) His intent that it shall be acted upon by the person to whom it is made;
- (6) Ignorance of its falsity on the part of the person to whom the representation is addressed;
- (7) The latter's reliance on the truth of the representation;
- (8) His right to rely upon it; and
- (9) His consequent damage.⁹⁷

Poulsbo Group cannot make a prima facie case on many elements.

1. No existing fact was falsely represented.

The fact, presumably, is that there would be no latecomers' assessment. The disclosure they claim was false – regarding existing or

⁹⁷ *Williams v. Joslin*, 65 Wash.2d 696, 399 P.2d 308 (1965).

pending assessments was demonstrably true. The assessment they complain about was not even applied for until February.⁹⁸ The only notice they had from the city was to the contrary. At all times prior to closing, no one from Talon believed there would be a latecomers' assessment.

Talon and Mr. Deaver were repeatedly informed by the city that there would be no latecomers' assessments. Because these representations were true at the time, and the written representations were executed with that caveat, there is no liability.

In *Rauth v. Evans*⁹⁹ the seller represented in writing that a septic system was in working order when they signed a purchase and sale agreement. The statement was true at the time it was made because they had recently had the system inspected. After the disclosure was made, the parties discovered that the septic had failed. The trial court specifically enforced the agreement – forcing the seller to repair the septic system prior to closing. This Court reversed, holding that under the language in the purchase and sale agreement the representations by the seller were limited to the best of their knowledge at the time the representation was made.

Here, Talon had it in writing from the city that there would be no latecomers' assessment. The written disclosure asked if there were any

⁹⁸ CP 352.

⁹⁹ 138 Wn.App. 834, 158 P.3d 1261 (2007).

“pending” assessments. Because the latecomers’ assessment had not even been applied for when the representation was made, it was not “pending.” As such, their representations were true at the time they were made, and liability cannot result.

Further, the other disclosure Poulsbo Group claims was false is unrelated to the issues at hand. The disclosure states:

Title....
...B. Are there any encroachments, unrecorded boundary agreements, boundary disputes or claims by neighbors pertaining to the property...?”¹⁰⁰

This disclosure is not generally about claims as represented by Poulsbo Group’s pleadings. The disclosure is about encroachment or other boundary claims. Just because Talon discussed sharing costs with Snowberry does not mean there was a boundary dispute or a claim by a neighbor. At the time it was made this disclosure was true to the best of their actual knowledge.

2. The speaker had no knowledge that the statement was false.

The latecomers’ agreement application was unknown to all until the city provided notice in August, 2007 – long after closing. Until then the only knowledge they had was the city and engineer’s repeated assurances that there would be no latecomer assessment. No one from

¹⁰⁰ CP 78.

Talon knew the situation had changed until they were contacted by Poulsbo Group's attorneys. So even if the hearing occurred before the disclosure was completed it was still true. No assessment was pending.

3. Poulsbo Group could not rely solely on the representations.

Poulsbo Group must be able to prove that their reliance on the representation was justifiable.¹⁰¹ The *Alejandre* court explained that “ ‘the right to rely’ element of fraud is intrinsically linked to the duty of the one to whom the representations are made to exercise diligence *with regard to those representations.*”¹⁰² Here the contract imposed a high duty of diligence on Poulsbo Group. But even though they were aware of a potential issue they relied on oral representations. They did not conduct their own inquiry.

Poulsbo Group claims they relied on the false oral representations from Talon -- that there were no latecomers' assessments. But a party cannot rely on a representation when he has no right to do so.¹⁰³ As such, when a party contracts to not rely on oral representations, he cannot later do so.¹⁰⁴ Here, Poulsbo Group alleged in discovery responses¹⁰⁵ that it relied on

¹⁰¹ *Alejandre*.

¹⁰² *Id* at 690 (quoting *Williams v. Joslin*, 65 Wn.2d 696, 697).

¹⁰³ *Williams v. Joslin*.

¹⁰⁴ *Kwiatkowski v. Drews*, 142 Wn.App. 463, 176 P.3d 510 (2008).

¹⁰⁵ CP 188.

oral representations regarding latecomers' assessments. But the contract prohibited this reliance.

Even if they could justifiably rely on these oral statements, these statements were, at the time, true to the best of their knowledge.

Additionally, Poulsbo Group was somehow alerted to the issue again. On February 15, 2007 they asked about it. Again, they relied on oral representations to allay their concerns.

Further, they had a right to terminate the contract if they did not like the Hearing Examiner's decision. They should have obtained and reviewed it. They knew about the decision. Because they did not obtain and review information that was available to them they could not rely on defendant's previous representations. As such, on undisputed facts, Poulsbo Group cannot meet their burden.

There are many Washington cases in every imaginable context that uphold this basic principal – a party on notice of an issue has a duty to inquire.¹⁰⁶ Poulsbo Group claims that if they had more information, they

¹⁰⁶*Alejandre, Williams v. Joslin*, 65 Wn.2d 696, 697, 399 P.2d 308, 308 - 309 (1965); *Kwiatkowski v. Drews*, 142 Wn.App. 463, 176 P.3d 510 (2008); *Sorenson v. Pyeatt*, 158 Wn.2d 523, 538-39, 146 P.3d 1172 (2006); *Van Dinter v. Orr*, 157 Wn.2d 329, 333, 138 P.3d 608 (2006); *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002); *W. Coast, Inc. v. Snohomish County*, 112 Wn.App. 200, 206, 48 P.3d 997 (2002); *Puget Sound Service Corp. v. Dalarna Management Corp.*, 51 Wn.App. 209, 214, 752 P.2d 1353, 1356 *review denied*, 111 Wn.2d 1007 (1988).

would not have bought the plat. But where a purchaser discovers evidence of a problem, the purchaser is obligated to inquire further.¹⁰⁷ Here, not only was there a common law duty to inquire, but the contract's terms gave the Poulsbo Group's a duty to inquire.

Poulsbo Group asserts that they did not read the decision and therefore it would not alert them. But this willful ignorance is contrary to the duty to inquire imposed by the contract. If Poulsbo Group did not review the decision, they should have. Because the Poulsbo Group had, at least, constructive notice of Snowberry's claim, they cannot claim ignorance.

The Poulsbo Group also admits to knowing about the issue prior to closing and discussing it with Mr. Deaver.¹⁰⁸ Had Poulsbo Group instead inquired at the city they could have learned about the application.

In *Alejandre* the plaintiffs were on notice that the septic system had not been fully inspected, but failed to conduct any further investigation. Thus, their claims were barred. Here, the Poulsbo Group was on notice that Snowberry was making a claim for reimbursement – John Jack specifically raised the issue with the engineer. As such, they

¹⁰⁷*Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Development Co.*, 115 Wn.2d 506, 525, 799 P.2d 250, 261 (1990); *Puget Sound Serv. Corp. v. Dalarna Management Corp.*; *Sloan v. Thompson*, 128 Wn.App. 776, 785, 115 P.3d 1009, 1013 (2005).

¹⁰⁸ CP 189.

knew about this issue and had a duty under the contract to investigate. They failed to do so.

The Hearing Examiner's decision, a public document, would have also been obtained if they conducted due diligence with the city. After the decision was released Mr. Jack asks about the latecomer assessment. Assuming that he had not been provided the decision – he did what he would have done anyway – he inquired about that issue with the engineer and relied on his assurances.

Because they had the obligation to inquire with the City, and they did not, instead relying on the engineer's oral representation, they cannot claim damages.

D. THE MERGER DOCTRINE BARS POULSBO GROUP'S CLAIMS.

Poulsbo Group claims that because Talon did not provide documents required to be provided prior to closing they were damaged. These claims are barred by the merger doctrine. The merger doctrine is founded on the parties' privilege to change the terms of their real estate sales contract at any time prior to performance.¹⁰⁹

Execution, delivery, and acceptance of the deed becomes the final expression of the parties' contract and therefore subsumes all prior agreements.¹¹⁰ “[T]he provisions of a contract for the sale of real estate,

¹⁰⁹ *Barber v. Peringer*, 75 Wn.App. 248, 251-252, 877 P.2d 223 (1994).

¹¹⁰ *Id* (citing *Snyder v. Roberts*, 45 Wn.2d 865, 871, 278 P.2d 348 (1955)).

and all prior negotiations and agreements, are considered merged in the execution and delivery of the deed.”¹¹¹

This is particularly true where, as here, Talon’s obligations to provide documents and plat approval were required *before* closing and delivery of the warranty deed.¹¹² Unlike cases where courts have found exceptions to the general rule, the purchase and sale agreement expressly provided that Talon was to provide development documents within three days of the contract signing, and the plat approval as a precedent to closing.¹¹³

But even though Poulsbo Group knew that the plat approval was available they did not ask to see it – and they did not review it prior to closing. The warranty deed warranted that no undisclosed encumbrances existed at closing.¹¹⁴ This warranty was true. The latecomers’ fees had not been assessed or recorded yet. Because the contract merged into the deed, and the warranty in the deed was sound, there is no claim.

E. FACTUAL ISSUES PRECLUDE SUMMARY JUDGMENT BEING GRANTED FOR POULSBO GROUP.

If this Court reverses the trial court’s summary judgment, it must still affirm the denial of Poulsbo Group’s motion. Disputed facts preclude

¹¹¹ *Peoples Nat'l Bank v. National Bank of Commerce*, 69 Wn.2d 682, 689, 420 P.2d 208 (1966).

¹¹² *Compare Id.* at 689-90.

¹¹³ CP 341.

¹¹⁴ RCW 64.04.030; CP 173-174.

summary judgment for Poulsbo Group on all claims. The court cannot conclude as a matter of law that (1) Talon's representations were made in bad faith; (2) Poulsbo Group exercised due diligence and fulfilled its duties under the feasibility and plat approval clauses; and (3) that Poulsbo Group's damages were a foreseeable result of Talon's not providing three emails to Snowberry regarding development costs. These would be questions for a jury.

Second, Poulsbo Group's claims fail if Poulsbo Group did receive the Hearing Examiner's decision. John Jack denies he received the plat approval. But the evidence could lead a jury to a different conclusion. The contract required it be provided – yet Mr. Jack did not insist on obtaining it? Mr. Jack was informed of the existence of the decision by the engineer on February 13, 2007. Two days later he had a meeting where he asked the engineer about the key issue contained in the decision – latecomers' fees. Further, the evidence shows (and common sense dictates) that no reasonable developer would close on a plat without reviewing the conditions of approval. A jury could infer that Mr. Jack asked the question because he was alerted to it by the decision.

Issues of bad faith, and the reasonableness of Poulsbo Group's actions preclude summary judgment for Poulsbo Group.

IV. ATTORNEY'S FEES

A prevailing party is entitled to fees on appeal if permitted by contract.¹¹⁵ Poulsbo Group argued below, and may argue here, that merger bars attorney's fees in this case.

The question of whether a particular contract term survives closing depends on whether the parties intended it to do so.¹¹⁶ In the case cited by Poulsbo Group in the trial court, *Barber*¹¹⁷ the contract provision granted "attorney fees to a party who must commence legal action to enforce any rights contained in the REPSA."¹¹⁸ As noted by the court in *Failes*, the *Barber* court did not quote the exact language of the fees provision. And *Failes* notes that because the parties in *Barber* were disputing a title issue, this provision was inapplicable. This is quite different from the language in the instant contract:

Attorneys' Fees. If buyer or seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses.

Poulsbo Group brought suit alleging breach of the agreement. Defendant is entitled to its attorney's fees.

¹¹⁵ RAP 18.1; *Bayo v Davis*, 127 Wn. 2d 256, 264, 897 P.2d 1239 (1995); RCW 4.84.330, *Tacoma Northpark, LLC v. NW, LLC (2004)* 123 Wn.App. 73, 96 P.3d 454.

¹¹⁶ *Failes v. Lichten*, 109 Wn.App. 550, 555, 37 P.3d 301, 303 (2001).

¹¹⁷ 75 Wn.App. at 253..

¹¹⁸ *Id.*

Additionally, *Barber's* holding is not applicable to cases premised on misrepresentation or fraud.¹¹⁹ If Talon prevails it is entitled to its reasonable attorneys' fees on appeal.

V. CONCLUSION

Had Poulsbo Group done due diligence by reviewing the Hearing Examiner's decision and inquiring of the city regarding latecomers' fees prior to closing they would have been alerted to the issue. They bore the risk of increased development costs by the contract. Their claims should be dismissed and Talon awarded their attorney's fees under the contract.

Respectfully submitted this 12th day of August 2009.

LAW OFFICE OF
DAVID P. HORTON, INC. P.S.



DAVID P. HORTON WSBA No. 27123

Attorney for Respondent

¹¹⁹ *Ross v. Ticor Title Ins. Co.*, 135 Wn.App. 182, 189-190, 143 P.3d 885, 888 (2006) *Affirmed in part, disapproved in part by Ross v. Kirner*, 162 Wash.2d 493, 172 P.3d 701 (2007).

From: Don Babineau [dbabineau@cesnwinc.com]

Sent: Wednesday, August 16, 2006 9:41 AM

To: holly@snowberryenterprises.com

Cc: C Deaver

Subject: FW: water and sewer stubs for Talon Glen

Attachments: 05178-utilities plan - Standard.zip; G1 05.17.06.pdf; Preliminary Plat 05.17.06.pdf; U1 05.17.06.pdf; 05178-GRADING - Standard.zip; pplat22 - Standard.zip

Holly,

I appreciate your quick response to my e-mail. Here are the PDF files for the project. I have also included the three cad files which you can pass on to your engineer. Hopefully we can have the connections to our project in before the road is done.

Please let me know if you have any problems with the files or if you need anything else.

Thank you,

Don Babineau
Design Engineer
C.E.S. NW Inc.
Phone: (253) 922-1532
Fax: (253) 922-1954
dbabineau@cesnwinc.com

-----Original Message-----

From: Don Babineau

Sent: Tuesday, August 15, 2006 11:04 AM

To: 'Holly White'

Cc: C Deaver

Subject: water and sewer stubs for Talon Glen

Holly,

Here is the conceptual utilities plan for Talon Glen. We are getting close to going to hearing on the plat. We have used your (Olsen's) profiles for Hogue Court to match grade with the Snowberry project.

What we would like to do is to have Olsen design the sewer and water stubs and have your contractor install them so that we do not have to tear up the road once it is built. We also will need the water main connection point designed and installed. This connection point is located adjacent to the lot line between lots 17 and 18. The sewer stubs are for lots 7 through 11 and 14 and 15. The water stubs are for lots 7 & 8, 9 & 10, 11 & 14, and 15 & 16. Our client, Talon Development, will pay for the design and installation of the water main connection and the water and sewer stubs.

Please contact me as soon as possible so that we can coordinate this portion of the project.

Thank you,

Don Babineau
Design Engineer
C.E.S. NW Inc.
Phone: (253) 922-1532
Fax: (253) 922-1954
dbabineau@cesnwinc.com

Utility Connections Talon GlenSnowberry.txt

From: tom smith [twsmith40@hotmail.com]

Sent: wednesday, August 16, 2006 6:45 PM

To: holly@snowberryenterprises.com

Cc: rdubois@reidrealestate.com

Subject: Utility Connections Talon Glen/Snowberry

Holly, I heard from CES (our design engineers) that your contractor is ready to install water and sewer lines. I understand that CES is designing the locations of connection points for these utilities to access some of the planned lots on our Talon Glen development.

Can your contractor give us a cost estimate to make those connections with stubs out from under the road. (I'm assuming this would be water and sewer). We would prefer to delay payment of any main line cost sharing until we actually develop the parcel.

Please call me and let me know how we can proceed. Thanks. Tom Smith
(360) 710-9034

From: C Deaver [cdeaver@cesnwinc.com]

Sent: Thursday, August 17, 2006 10:45 AM

To: holly@snowberryenterprises.com

Cc: Don Babineau; rjohnson@nlolson.com; talondevelopment@gmail.com;
kasiniak@cityofpoulsbo.com; afunk@cityofpoulsbo.com

Subject: Talon Glen and Snowberry

Holly,

It my understanding that your engineer is backed up and may not be able to make the changes. I am willing to have CES NW Inc. make the changes to the approved plans. However, I am not sure the city will accept revised plans from CES. In my opinion the best way is to handle this through a change order process. The changes in my opinion are rather minor. There are 7 sanitary service stubs at 50' long. In addition there are 10 water services that are needed. Please see the attached map (in PDF format) for specifics. I think the engineering work could be completed in 3-4 hours. I am sure my client will be in contact with you to discuss the cost associated with the engineering and construction of these improvements.

I am sure everyone knows that time is of the essence in regards to these construction related items as the Snowberry site is currently under construction. It is our desire to have these utilities installed now to minimize any future impacts created by the development of Talon Glen.

Please call me with any questions or concerns.

Thank You,

Craig Deaver
Principal
C.E.S. N.W. Inc.
5210 12th Street East
Fife, WA 98424
Phone: (253) 922-1532
Fax: (253)922-1954
Cell: (253) 686-6040

FILED
COURT OF APPEALS
DIVISION II

09 AUG 12 PM 1:51

STATE OF WASHINGTON
BY _____
DEPUTY

NO. 38984-3-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

POULSBO GROUP, LLC)
)
 Appellant,)
)
 vs.)
)
 TALON DEVELOPMENT, LLC,)
)
 Respondent.)
 _____)

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on August 12, 2009, I sent via mail through the U.S. Postal Service; and by email transmission, a copy of the Brief Of Respondent to:

Bryan C. Graff
Ryan, Swanson & Cleveland, PLLC
1201 Third Avenue, Suite 3400
Seattle, WA 98101-3034

DATED this 12th day of August, 2009.



DEBRA R. SMITH, Legal Assistant
David P. Horton, Inc. P.S.
3212 NW Byron Street, Suite 104
Silverdale, WA 98383
(360)692-9444

CERTIFICATE OF SERVICE

LAW OFFICE OF DAVID P. HORTON, INC. PS
3212 NW Byron Street Suite 104
Silverdale, WA 98383
Tel (360) 692 9444
Fax (360) 692 1257