

NO. A06-1940 and A06-1957

State of Minnesota
In Court of Appeals

Margaret A. Brickner, Margaret A. Brickner as Trustee of the Thomas
E. Brickner Credit Trust, and Braam Investment, Inc.,

Respondents,

vs.

One Land Development Company,

Defendant (A06-1940)

Appellant(A06-1957)

and

John Andrew Duckwell,

Appellant (A06-1940)

Defendant(A06-1957).

APPELLANTS BRIEF

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STATEMENT OF THE CASE AND FACTS

1. Trial Court: Anoka County District Court
2. Trial Judge: Honorable James A. Morrow
3. Nature of the Case and its Disposition:

Real Estate Sale/Purchase. Appellant One Land Development Company (“One Land”) purchased Respondents’ real estate consisting of three separate lots, (the “Property”), which included Respondent Braam Investment, Inc.’s Sandee’s restaurant business (“Sandee’s”) and associated assets (collectively the “Restaurant Business”), all located at 6490 Central Avenue, Fridley, Minnesota 55432. This purchase was accomplished by a written Asset and Purchase Agreement dated April 22, 2002 (the “Agreement”)(Trial Exhibit¹ 24). Respondents knowingly breached the contract by warranting in writing that the property was free of easements/encumbrances, failing to obtain timely title commitments, failing to provide One Land with contractual title commitment review and marketability objection rights, failing to timely close, falsely asserting a statutory cancellation of the Agreement in violation of the Agreement, breaching implied contractual covenants of good faith and fair dealing, and entering into a subsequent sale agreement of the Property and Restaurant Business to a third-party (Town Center Development, Inc. (“Town Center”)). One of the offending easements was subsequently removed; two still remain to date.

Respondents asserted claims for breach of contract, specific performance of

¹ Hereinafter “TE”.

Agreement, equitable relief, fraud and damages, including lost profits. The Trial Court denied all of Appellants' requested relief, upholding statutory cancellation, and sustaining waiver/abandonment defenses. The Trial Court also rejected Appellant's damage evidence as "too speculative". (See Trial Court Findings of fact, Conclusions of law and Order for Judgment (part 2 of 2), Appellants' Joint Appendix at page 217).²

STATEMENT OF FACTS

1. Parties.

A. Respondents. Respondent Margaret A. Brickner is an adult individual with an co-ownership interest in the Property. (April 26-27, 2005 Trial Transcript (M. Brickner) at P. 165).³ Ms. Brickner is also the trustee for Respondent Thomas E. Brickner Credit Trust, which also possesses an ownership interest in the Property. (April 26-27, 2005 TT (M. Brickner) at P. 162). Ms. Brickner has worked buying and selling real estate in the past, wherein she drafted purchase agreements. (April 26-27th, 2005 TT (M. Brickner) at P. 162, 179).

Respondent Braam Investments, Inc. ("Braam Investments") is a Minnesota Corporation which leased a portion of the Property for the operation of Sandee's, and which owns Sandee's and its assets. (April 25-26 TT (M. Brickner) at P. 163). Braam Investments is wholly owned by married couple Ms. Cindy Jean Braam and Mr. Gary Braam; Ms. Braam

² Hereinafter "J. App.- ____". (For purposes of brevity, Appellants submit a Joint Appendix in this matter).

³ Hereinafter "(trial date) TT, (witness) at P./pp. ____".

is the daughter of Ms. Brickner. (April 25, 2005 TT (C. Braam) at P.56-57). Ms. Braam has been a party to real estate purchase agreements in the past, and is familiar with the same. (April 25, 2005 TT (C. Braam) at P. 82). Thomas E. Brickner was Ms. Braam's late father. (April 25, 2005 TT, (C. Braam), at P. 57). Collectively, these Respondents constituted the "Seller" in the subject transaction. (Trial Exhibit 24).⁴

B. Appellants. Appellant One Land Development Company ("One Land") is a real estate company engaged in real estate development in Minnesota. (May 12 - 13, 2005 TT (T. Gambucci) at P. 10-11). One Land has operated for many years, and was formally incorporated in or about November 28, 2001. (May 12 - 13, 2005 TT (T. Gambucci) at P. 11; *See* TE 9). Mr. Thomas Gambucci is an officer of One Land. (May 12 - 13, 2005 TT (T. Gambucci) at P.10). Appellant John Andrew Duckwall was an assignee of One Land in the subject transaction. Mr. Duckwall is employed as an elementary school music teacher. (May 13, 2005 TT (J. Duckwall) at P. 5).

2. Witnesses.

In addition to the parties and their principals, the following persons referenced herein testified during the court trial of this matter:

A. Mr. Donald E. Tonseth. Mr. Tonseth was the Title Examiner of Land Title, Inc. ("Land Title"), and was responsible for preparing the various "evidence of title" commitments in this matter. (April 26-27, 2005 TT (D. Tonseth) at P. 54-55);

⁴ Hereinafter, "TE".

B. Mr. Paul A. Holmes. Mr. Holmes is an architect who conducted meetings with One Land regarding evaluating plans for building a senior housing facility upon the Property. (April 27, 2005 TT at P. 244, 246-247);

C. Jeffrey Johnson, Esq. In addition to other attorneys in his firm, Mr. Johnson represented the Respondents in the sale/purchase transaction, and was permitted by the Trial Court to provide expert testimony on behalf of the Respondents; and

D. Mr. Clark Goset. Expert Zoning and Business/Real estate appraiser called on behalf of Appellants.

3. Pre-Purchase Agreement.

The business of One Land includes buying a piece of property or real estate, and developing the property into either a multi-housing or better use. (May 12 - 13, 2005 TT (T. Gambucci) at P. 11). Mr. Gambucci is experienced and familiar in evaluating property for zoning requirements/issues. (May 12 - 13, 2005 TT (T. Gambucci) at P. 12-13). One Land's business also includes selling/assigning rights to real estate. (May 12 - 13, 2005 TT (T. Gambucci) at P. 11). Purchase Agreement assignments are customary in the business. *Id.* One Land's business generally involves the construction of multi-unit buildings above the size of four-plexes. (May 12 - 13, 2005 TT (T. Gambucci) at P. 14). One Land's projects generally exceed one million dollars in cost. (May 12 - 13, 2005 TT (T. Gambucci) at P. 16).

As a matter of course, One Land determines zoning compatibility with the project under consideration before purchasing real estate to develop or assign. (May 12 - 13, 2005

TT (T. Gambucci) at P. 13). One Land then makes whatever contact are necessary with city officials, architects, and others involved in that general process. (May 12 - 13, 2005 TT (T. Gambucci) at P. 13); *See* TE 1 related to subject Property).

One Land originally contacted Ms. Brickner in or about the Winter of 2001 to express interest in purchasing an unrelated parcel, which led to discussions regarding the Property. (May 12 - 13, 2005 TT (T. Gambucci) at P. 17). In late 2001 or early 2002, One Land visited and made a general visual inspection of the Property. (May 12 - 13, 2005 TT (T. Gambucci) at P. 17). Mr. Gambucci also considered the purchase of some adjacent property (the "Tamarisk Property") and incorporating same into One Land's project. (May 12 - 13, 2005 TT (T. Gambucci) at P. 54). In furtherance of this interest, Mr. Gambucci contacted and met directly with the owners of the Tamarisk Property twice, in an effort to negotiate a purchase. *Id.*

One Land made a second visual inspection of the Property shortly thereafter, with Gary Braam. (May 12 - 13, 2005 TT (T. Gambucci) at P. 18). There was snow on the ground. *Id.* At that time, Mr. Gambucci was unable to see any easements. (May 12 - 13, 2005 TT (T. Gambucci) at P. 19). Although disputed by the Respondents, at no time during any of Mr. Gambucci's meetings did Respondents ever discuss any easements upon the Property. (May 12 - 13, 2005 TT (T. Gambucci) at pp. 20-21). The Property is comprised of three (3) separate lots. (May 12 - 13, 2005 TT (T. Gambucci) at P. 27).

Mr. Gambucci began to develop ideas for the Property, envisioning a building that

would be connected to the pre-existing Sandee's restaurant. (May 12 - 13, 2005 TT (T. Gambucci) at P. 31). The building plans would have involved severing an unknown ingress and egress road easement on the Property. (May 12 - 13, 2005 TT (T. Gambucci) at pp. 33-34). The drive central easement conflicted with One Land's building plans. (May 12 - 13, 2005 TT (T. Gambucci) at P. 42).

Mr. Gambucci acquired the relevant C1 and C2 City of Fridley Code Regulations and planned conforming and permitted uses of the Property as a senior multi-unit residential housing facility. (May 12 - 13, 2005 TT (T. Gambucci) at P. 37; *See* TEs 153, 154 and 155). Lots 1 and 2 of the Property, which run adjacent to Central Avenue, were zoned C2, which is the "highest and best use" permitted by the Fridley codes. *Id.* The C2 code designation also included the lot which contained the existing Sandee's Restaurant business. *Id.* The Westerly-Southwesterly lot 3 of the Property was zoned C-1. (May 12 - 13, 2005 TT (T. Gambucci) at P. 38). Mr. Gambucci, upon review of the C1 and C2 Fridley Code sections, determined that the senior living facility One Land planned for the Property was a stated permitted use. (May 12 - 13, 2005 TT (T. Gambucci) at P. 39). Mr. Gambucci also determined that, according to the "one parking place - one unit" requirements of the C-2 Fridley zoning regulations permitted up to 120 living units upon the Property. (May 12 - 13, 2005 TT (T. Gambucci) at P. 41). However, Mr. Gambucci planned less units than permitted, to avoid too much density and lower unit values. *Id.* Mr. Gambucci accordingly established that One Land would build between "eighty to one hundred units" upon the

Property. *Id.* As a qualified “permitted use”, One Land was free to build its senior facility and attach same to the Sandee’s Restaurant without City approval. *Id.*, *See* TEs 153, 154 and 155).

One Land subsequently provided some proposed purchase agreements for the Respondents’ consideration. (April 25, 2005 TT, (C. Braam) at pp. 2, 4; TE 13 and 22, J. App.- 29 and 53). Ms. Braam subsequently contacted attorney Jeffrey Johnson to draft the Purchase Agreement. (April 25, 2005 TT at P. 7).

One Land then proceeded to design and plan dimensions of the units using existing floor plans and specifications, and to discuss construction with potential builders including Wensman Homes/Construction. (May 12 - 13, 2005 TT (T. Gambucci) at pp. 44-50; *See* TEs 144 and 145). Mr. Gambucci began to modify and incorporate the specifications into One Land’s project upon the Property. (May 12 - 13, 2005 TT (T. Gambucci) at P. 48; TEs 86 and 145). Mr. Gambucci next began to figure lot setback, square footage, maximum lot coverage figures and models, and prepared to obtain a building permit. (May 12 - 13, 2005 TT (T. Gambucci) at P. 50).

Mr. Gambucci researched local demographics, and had contact with Pope and Associates Architects. (May 12 - 13, 2005 TT (T. Gambucci) at P. 55). Mr. Gambucci also contacted and met with a representative of KKE Architects. (May 12 - 13, 2005 TT (T. Gambucci) at P. 62-63; TE 157). Mr. Gambucci contacted other prospective architects to solicit bids on the project. (May 12 - 13, 2005 TT (T. Gambucci) at P. 63; *See* TE 1). Mr.

Gambucci also contacted the Adolphson Peterson engineering and construction company, the builders of a large senior facility in Stillwater, Minnesota. (May 12 - 13, 2005 TT (T. Gambucci) at P. 50). In a later meeting with Adolphson and Peterson, a representative of Pope and Associates architects was brought by Adolphson and Peterson. (May 12 - 13, 2005 TT (T. Gambucci) at pp. 50-51).

Mr. Paul Holmes and Pope and Associates offered to prepare plans for One Land's project free of charge in an attempt to attract One Land's business and secure the project. (April 27, 2005 TT (P. Holmes) at P. 265). In this regard, Mr. Holmes, on behalf of Pope and Associates, assisted with evaluating a number of renderings for One Land's project. (*See* TEs 2 and 87). In each rendering, either structures or walkways drawn severed and/or were in direct conflict with undisclosed easements that existed upon the Property. *See Id.* Mr. Holmes testified that it was very important in his practice to consult with and consider municipal zoning regulations, and did so in this project. (April 27, 2005 TT (P. Holmes) at pp. 270-271).

Mr. Gambucci next prepared promotional materials for presentation to interested architects, builders, development partners, financing agencies and others customarily involved in such development projects. (May 12 - 13, 2005 TT (T. Gambucci) at pp. 66-67; TE 141). The steps taken by One Land, and the materials generated by Mr. Gambucci and One Land, were in preparation for either developing the project itself, associating with partners on the project, or assigning all or part of the interest(s) to other interested parties.

(May 12 - 13, 2005 TT (T. Gambucci) at pp. 76-77). The building plan One Land utilized for building upon the Property provided for 60 parking spaces on the surface, and 63 underground parking spaces. (May 12 - 13, 2005 TT (T. Gambucci) at pp. 55-56; *See* TE 86). Mr. Gambucci also drafted site plans and renderings on his own using templates. (May 12 - 13, 2005 TT (T. Gambucci) at pp. 52-53; *See* TE 86). Mr. Gambucci's renderings and proposed joinder of the Sandee's Restaurant with the senior living facility also conflicted with the yet undisclosed easement(s). (*See* TE 86). Logically, Messrs. Gambucci and Holmes would not have drawn walk paths and building structures over and through the easements had either known that there were easements in direct conflict with all of the drawn plans. (*See*, e.g., TEs 2, 86 and 87). Pope and Associates' rendering provided surface parking for 60 cars, and 63 underground. (*See* TE 87). The 123 parking stalls, both above and below ground, did not include any use of an adjacent Tamarisk Property parcel. (May 12 - 13, 2005 TT (T. Gambucci) at pp. 57-58; *See* TE 87). The Pope and Associates rendering, Trial Exhibit 87, also specifically included 40 separate parking places for the Sandee's Restaurant. (May 12 - 13, 2005 TT (T. Gambucci) at pp. 58; *See* TE 87). The project reflected by Trial Exhibit 87 called for the structure to be located entirely upon the C-2 Fridley coded lots, with parking, both underground and above ground, located upon the remaining C-1 lot, all specifically permitted uses under the C-1 and C-2 Fridley zoning requirements. (May 12 - 13, 2005 TT (T. Gambucci) at P. 59; *See* TEs 153 and 154). In addition, the Sandee's Restaurant would continue to be a permitted use. (May 12 - 13, 2005

TT (T. Gambucci) at pp. 59-60. All renderings in this matter prepared by Pope and Associates and/or One Land, locate the senior living building upon the C-2 zoned lots. (See TEs 2, 86 and 87).

4. Purchase Agreement between One Land and Respondents, Margaret Brickner individually, The Thomas E. Brickner Credit Trust and Braam Investments, Inc. (Collectively "Seller").

Appellants rejected One Land's proposed purchase agreements, in favor of having their attorney Jeffrey Johnson at the Barna, Guzy & Steffen law firm draft the Purchase Agreement. (May 12 - 13, 2005 TT (T. Gambucci) at pp. 80-81; See TE 24, J. App.- 60). The Purchase Agreement is very similar to a subsequent purchase agreement drafted by attorney Johnson purporting to sell the Property and Restaurant Business to a third party, Town Center. (April 27, 2005 TT (J. Johnson) at P. 364; See TEs 24 and 48, J. App.- 60, 121 (nearly identical)). Mr. Gambucci did not have input in the attorney drafting of the Purchase Agreement, Trial Exhibit 24. (May 12 - 13, 2005 TT (T. Gambucci) at P. 81).

As the Barna, Guzy & Steffen law firm began to provide drafts of the Purchase Agreement, Mr. Gambucci had absolutely no contact with the Barna, Guzy & Steffen law firm. (May 12 - 13, 2005 TT (T. Gambucci) at P. 80; April 27, 2005 TT (J. Johnson) at P. 355 (Mr. Johnson has never spoken with Mr. Gambucci)). Mr. Gambucci and One Land provided no language on the Purchase Agreement; the Purchase Agreement was drafted solely by Seller and Barna, Guzy and Steffen law firm. (May 12 - 13, 2005 TT (T. Gambucci) at P. 82). Respondents further demanded that One Land contribute \$500.00 to

Appellants' attorney fees, which One Land timely paid. (*See* TE 23; App.- 59).

The Purchase Agreement was signed by all Respondents and One Land on April 22, 2002 (*See* TE 24; J. App.- 60). When the Purchase Agreement was signed on April 22, 2002, Mr. Gambucci was unaware of any easements upon the Property. (May 12 - 13, 2005 TT (T. Gambucci) at P. 82).

The parties agreed to a sale price of \$750,000.00, of which \$250,000.00 was attributed to the Sandee's business goodwill and assets, and \$500,000 to the Property. (TE 24, J. App.- 60). In the Agreement, the Respondents represented and warranted that the property was free of easements. (*See* Article VI, ¶6.2, TE 24; J. App.- 60). There were no easements identified in the Purchase Agreement whatsoever otherwise, including no attachment identifying any easements as permitted exceptions. *Id.* However, three existing easements encumbered the Property rendering Respondents' representations and warranties as to the merchantability and status of the Property false. (April 25, 2005 TT (C. Braam) at pp. 107-108; April 26-27, 2005 TT (G. Braam) at P. 134-135; April 26-27, 2005 TT (M. Brickner) at P. 182); April 27, 2005 TT (J. Johnson) at P. 393).

One Land timely paid to Seller the \$15,000.00 contractual earnest money. (*See* Exhibit 25; J. App.- 83). According to Article III, paragraph 3.2 of the Purchase Agreement, Seller was required to hire a title company and provide all title commitments relative to the Property "a soon as possible". (May 12-13 , 2005 TT (T. Gambucci) at P. 85, TE 24, J. App- 60). One Land did not hire Land Title to provide any title work in this case. (May 12-13 ,

2005 TT (T. Gambucci) at P. 85).

With respect to Article 1, paragraph 1.3 of the Purchase Agreement, One Land determined that the intended project, based upon the favorable C-1 and C-2 Fridley zoning requirements, did not require city approval, and therefore none was obtained. (May 12-13, 2005 TT (T. Gambucci) at pp. 86-87; TEs 153, 154 and 155). No city approval was needed for One Land's parking plans. *Id.* One Land sent a letter to Seller waiving the governmental approvals as provided in Article paragraph 1.3 of the Purchase Agreement. (May 12-13 , 2005 TT (T. Gambucci) at pp. 88-89; TE 19⁵; J. App.- 52).⁶ One Land also successfully extended the closing date in this matter pursuant to Article V, paragraph 5.1 of the Purchase Agreement, paying to Seller the sum of \$20,000.00 at the same time. (May 12-13, 2005 TT (T. Gambucci) at P. 89; April 26-27, 2005 TT (C. Braam) at P. 4; *See* TEs 18, 19 and 31, J. App.- 50, 51 and 52). One Land confirmed with Seller the Article III, paragraph 3.2 contractual right of having 20 days to object to errors in the title commitment and the marketability of the Property after the last commitment was received from Seller. (May 12-13, 2005 TT (T. Gambucci) at P. 90; TE 24, J. App.- 60).

According to the Purchase Agreement and all admitted extensions, the Closing Date was to occur on or before November 18, 2002. (April 25, 2005 TT (C. Braam) at P. 98; April

⁵ The letter is erroneously dated August 22, 2001; the date was a typographical error, as it should have stated August 22, 2002. (May 12-13 TT (T. Gambucci) at P. 88).

⁶ Although Respondents contest written notice of the waiver, the Purchase Agreement did not provide for any notice deadline(s). (April 25, 2005 TT (C. Braam) at P. 92; *See* generally, TE 24, J. App.- 60).

27, 2005 TT (J. Johnson) at P. 424). With the late delivery by Respondents to One Land of a second title commitment dated November 6, 2002, on November 15, 2002, the Closing Date was December 5, 2002. (See May 12-13, 2005 TT (T. Gambucci) at P. 98; TEs 24, 40 and 41, J. App.- 60, 100 and 103).

Mr. Gambucci met 2-3 times with Mr. Paul Holmes of Pope Architects. (April 27, 2005 TT (P. Holmes) at P. 246). The first of these meetings was in September of 2002. (April 27, 2005 TT (P. Holmes) at pp. 266-267). Mr. Holmes was asked by Mr. Gambucci to assist One Land to determine feasibility of developing the Property. (April 27, 2005 TT (P. Holmes) at pp. 267-268). In Mr. Holmes' business, review of zoning requirements are important in site consideration. (April 27, 2005 TT (P. Holmes) at pp. 270-271). Mr. Holmes determined that the building proposed by One Land would be a "conforming" use under the Fridley zoning codes. (April 27, 2005 TT (P. Holmes) at pp. 276-277). Mr. Holmes also determined that One Land could locate a senior facility upon the Property with 123 units and 123 parking spaces. (April 27, 2005 TT (P. Holmes) at pp. 283-284). One of the plans offered by One Land to Mr. Holmes involved the construction of a building which would be attached to the existing Sandee's restaurant building. (April 27, 2005 TT (P. Holmes) at P. 288; TE 143). This building plan would involve changing the driveway easement from a through-way road into a underground parking ingress/egress access. (April 27, 2005 TT (P. Holmes) at P. 290).

One Land received the first of the Land Title, Inc. (“Land Title”) “evidence of title”⁷ title commitments (dated August 19, 2002) on October 11, 2002, nearly six months after the parties signed the Purchase Agreement. (May 12-13, 2005 TT (T. Gambucci) at pp. 90-91; April 26-27, 2005 TT (C. Braam) at P. 9; TE 29, J. App.- 89). This first title “evidence of title” title commitment from Seller contained numerous errors and material omissions. (May 12-13, 2005 TT (T. Gambucci) at P. 91; April 26-27, 2005 TT (D. Tonseth) at pp. 65-70; *See* TE 29, J. App.- 89). The first title commitment also contained three previously undisclosed easements upon the Property, in violation of the Seller “Representations and Warranties” of the Purchase Agreement. (May 12-13, 2005 TT (T. Gambucci) at P. 91; TEs 29 and 24, J. App.- 89, 60).⁸ The easements created a serious conflict with One Land’s plans and reduced the number of units capable of being located upon the Property, created setback problems, and conflicted with the use and location of the senior units. (May 12-13, 2005 TT (T. Gambucci) at P. 92).

One Land proceeded to contact Seller and Land Title to advise of the conflicting easements and the need for their immediate removal. (May 12-13, 2005 TT (T. Gambucci)

⁷ The Purchase Agreement specifically provided One Land with twenty (20) days within which to object to the title “after receipt of the last of such Title Evidence”. (TE 24, J. App.- 60, Article III, paragraph 3.2). The Land Title title commitments constituted the “evidence of title” for purposes of the Purchase Agreement. (April 25, 2005 TT (C. Braam) at P. 108, April 27, 2005 TT (J. Johnson) at P. 400).

⁸ The three easements which are the subject of this matter are (1) a 20 foot utility easement over the Southerly portion of Lot 2; (2) an ingress/egress over and across the South 60 feet of the North 135 feet of Lot 1; and (3) an Easement Agreement on record. (*See* TE 29, J. App.- 89).

at P. 93; April 26-27, 2005 TT (D. Tonseth) at P. 57-58; TE 33⁹, J. App.- 99). Land Title advised Seller that they had failed to provide the title abstract for one of the Property lots, and needed to provide same to the Land Title right away. (May 12-13, 2005 TT (T. Gambucci) at P. 93; TE 30, J. App.- 94 (containing a request of Cindy Braam from Don Tonseth at Land Title for the missing abstract)). Specifically, the August 19, 2002 Title Commitment reflected the need for further information before the document would be complete. (April 26-27 , 2005 TT (C. Braam) at P. 10; *See* TE 30, J. App.- 94).

Subsequent to the August 19, 2002 Title Commitment (TE 29), Seller and Land Title issued a second title commitment, dated November 6, 2002, correcting some of the errors of the August 19, 2002 Title Commitment, but failing to correct a number of the other errors. (May 12-13, 2005 TT (T. Gambucci) at P. 96; April 26-27, 2005 TT (D. Tonseth) at P. 60 (revised title commitment with new effective date); TE 40, J. App.- 103). The August 19, 2002 Title Commitment was not the last title commitment issued in this matter. (April 26-27 , 2005 TT (D. Tonseth) at P. 73). The November 6, 2002 Title Commitment was the product of changes made to the August 19, 2002 title commitment. (April 26-27, 2005 TT (D. Tonseth) at pp. 84-85; *See* TE 40, J. App.- 103).

The November 6, 2002 title commitment was left by Land Title to be picked up by Mr. Gambucci and One Land on November 15, 2002. (May 12-13, 2005 TT (T. Gambucci)

⁹ The date of August 22, 2002 was another typographical error; the letter was sent contemporaneously with the discovery of the newly identified easements and the missing lot abstract noted in Exhibit 30. (May 12-13, 2005 TT (T. Gambucci) at pp. 93-95).

at P. 96).¹⁰ The subsequent November 6, 2002 title commitment removed one of the easements, but unacceptably reflected the continuing existence of two easements. (May 12-13, 2005 TT (T. Gambucci) at P. 97; *See* TE 40, J. App.- 103). L. 4-15). The November 6, 2002 Title Commitment still reflected the numerous other errors and omissions including naming the wrong seller/buyer, failing to provide ALTA information, reflecting errors in the legal description and other impermissible mistakes and omissions. (*See generally*, April 26-27, 2005 TT (D. Tonseth) at pp. 87-90; *See* TE 40, J. App.- 103).¹¹ Missing information rendered the November 6, 2002 Title Commitment “incomplete” as well. (April 26-27, 2005 TT (D. Tonseth) at P. 87).

Subsequently, Ms. Cindy Braam agreed to take the easement issue to her attorney to review. (May 12-13, 2005 TT (T. Gambucci) at P. 101). Nothing further was heard on the promised attorney review. *Id.*

Instead, on November 12, 2002, Seller issued a letter to One Land threatening One Land with default of the Purchase Agreement unless it closed upon the real estate by November 22, 2002, just seven days after Mr. Gambucci picked up the November 6, 2002

¹⁰ Mr. Tonseth testified that the November 6, 2002 title commitment was left for pickup after November 6, 2002. (April 26-27, 2005 TT (D. Tonseth) at P. 86).

¹¹ While the above was occurring, Mr. Gambucci proceeded to order a title commitment on the adjacent Tamarisk parcel as One Land was still interested in potentially enlarging the project. (*See* TE 31, J. App.- 98; May 12-13, 2005 TT (T. Gambucci) at pp. 98-99).

Title Commitment. (See TE 42, J. App.- 111).¹² The closing date demanded by Seller was outside of the Closing Date mandated by the Purchase Agreement. (April 25, 2005 TT (C. Braam) at P. 98; TE 24, J. App.- 60). The demanded November 22, 2002 closing date was also within One Land's 20-day objection period. (April 25, 2005 TT (C. Braam) at P. 116-117).

After the closing did not occur on November 22, 2002, Seller proceeded to immediately commence cancellation proceedings based solely upon the reported ground that One Land failed to close on or before November 22, 2002. (TE 44, J. App.- 113). In so doing, Respondents retained \$35,500.00 in prepaid earnest money, extension payments and attorney fees. *Id.*

One Land retained an attorney, and attempted to work out the problems with Respondents/Seller. (May 12-13, 2005 TT (T. Gambucci) at P. 102. Mr. Gambucci and One Land continued to work on the project looking at other projects and designs, conduct meetings with Mr. Duckwall, and hire further legal counsel in November of 2003 in an attempt to pursue his rights under the Purchase Agreement. (May 12-13, 2005 TT (T. Gambucci) at pp. 102-107).

¹² The Letter included a courtesy copy notation to counsel for Town Center, G. Scott Hoke, a purported subsequent purchaser of the Property. (April 25, 2005 TT (C. Braam) at P. 61-62; TE 42, J. App.-111).

ARGUMENT

I. STANDARD OF REVIEW.

In a case tried without a jury, the scope of review is limited to determining whether the district court's findings are clearly erroneous and whether the court erred as a matter of law. *Powell v. MVE Holdings, Inc.* 626 N.W.2d 451, 457 (Minn. Ct. App. 2001); citing *Schweich v. Ziegler*, 463 N.W.2d 722, 729 (Minn. 1990). On appeal, the district court's findings will be reversed only if the "reviewing court is left with a definite and firm conviction that the district court has made a mistake." *Powell, Supra.*, 626 N.W.2d at 457; citing *Gjovik v. Strobe*, 401 N.W.2d 664, 667 (Minn. 1987) (citation omitted).

This court reviews questions of law de novo. *Anderson, Supra.*, 712 N.W.2d at 800, citing with approval, *Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984). In short, "[a] trial court's conclusions of law are not binding on the appellate court." *MCC Investments v. Crystal Properties*, 451 N.W.2d 243, 246 (Minn. Ct. App. 1990), citing with approval, *A.J. Chromy Construction Co. v. Commercial Mechanical Services, Inc.*, 260 N.W.2d 579, 582 (Minn. 1977). Whether an agreement is ambiguous is a question of law. *Anderson v. McOskar Enterprises, Inc.*, 712 N.W.2d 796, 800 (Minn. Ct. App. 2006), citing with approval, *Blattner v. Forster*, 322 N.W.2d 319, 321 (Minn. 1982).

Parole Evidence Rule.

"The primary goal of contract interpretation is to determine and enforce the intent of the parties." *Motorsports Racing Plus, Inc., v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323

(Minn. 2003). “Where there is a written instrument, the intent of the parties is determined from the plain language of the instrument itself.” *Metro Sports Facilities Commn. v. General Mills*, 470 N.W.2d 118, 123 (Minn. 1991). “We have consistently stated that when a contractual provision is clear and unambiguous, courts should not rewrite, modify, or limit its effect by a strained construction.” *Telex Corp. v. Data Products Corp.*, 271 Minn. 288, 295, 135 N.W.2d 681, 687 (1965)(citations omitted). “It is a well-established general rule that where the intention of the parties may be gained wholly from the writing, the construction of the contract is for the court.” *Donnay v. Boulware*, 275 Minn. 37, 44, 144 N.W.2d 711, 716 (Minn. 1966). Where a written agreement is completely integrated, “. . . evidence designed to supplement the terms of the agreement is inadmissible.” *Westendorf v. Pennsylvania General Ins. Co.*, 435 N.W.2d 110, 112 (Minn. Ct. App. 1989)(citing Restatement of the Law 2d Contracts § 216(1)). “Determination of whether the agreement is completely integrated is for the trial court.” *Westendorf, Supra.*, 435 N.W.2d at 112, citing with approval, *Taylor v. More*, 195 Minn. 448, 454-55, 263 N.W. 537, 540 (1935), cited in *United Artists Communications, Inc. v. Corporate Property Investors*, 410 N.W.2d 39, 42 (Minn. Ct. App. 1987). “A document complete on its face establishes a presumption of completeness.” *Id.*, 435 N.W.2d at 113, *Taylor, Supra.*, 195 Minn. 448 at 453, 263 N.W. at 539, quoting *Thompson v. Libby*, 34 Minn. 374, 377-78, 26 N.W. 1, 2 (1885)). Extrinsic evidence cannot be used to supply a missing term to a written conveyance; it can only be used to explain an unclear term. *Bosold v. Ban Con, Inc.*, 392 N.W.2d 724, 726 (Minn. Ct.

App. 1986), citing with approval, *Malevich v. Hakola*, 278 N.W.2d 541, 544 (Minn. 1979).

The Trial Court did not make any determination that any section(s) of the Purchase Agreement were ambiguous, or reasonably susceptible of differing interpretations.

II. RESPONDENTS' JOINT BREACHES OF THE PURCHASE AGREEMENT EXCUSED ANY FURTHER PERFORMANCE OF THE AGREEMENT BY APPELLANT ONE LAND, AND PREVENTS RESPONDENTS FROM ASSERTING CONTRACTUAL RIGHTS AND OBLIGATIONS OF THE AGREEMENT AGAINST APPELLANT ONE LAND.

Prior Breaches of Contract.

“It is settled that a party who breaches his contract cannot insist upon performance by the other party.” *Nakdimen v. Baker*, 111 F.2d 778, 781 (8th. Cir. 1940)(citations omitted). When one party breaches a contract, the other party’s further performance is excused. *Greer v. Kooiker*, 312 Minn. 499, 512, 253 N.W.2d 133, 142 (Minn. 1977). In fact, “[t]he party who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a substantial failure to perform. This is, of course, a well settled principal of the law.” *Griffen v. Chesney*, 168 Ark. 240, ___, 269 S.W. 582 (Ark. S. Ct. 1925); *MTS Co. v. Taiga Corp.*, 365 N.W.2d 321, 327 (Minn. Ct. App. 1985), *review denied*, (Minn. June 14, 1985)(“a party cannot raise to its advantage a breach of contract against another party when it has first breached the contract itself”). “In *MTS*, this court held that the first breaching party could not sue on the basis of the other party’s subsequent breach because (1) the initial breach was continuing at the time that the first breaching party brought the action against the subsequent breacher, and (2) the subsequent breach resulted directly

from the initial breach. *Id.* at 327. *MTS*, thus, involved a situation where the first breach set off consequences that changed the rules governing the ongoing relationship.” *Carlson Real Estate Co. v. Soltan*, 549 N.W.2d 376, 380 (Minn. Ct. App. 1996), citing with approval, *MTS Co., Supra.*, 365 N.W.2d at 327.

“Under general contract law, a party who first breaches a contract is usually precluded from successfully claiming against the other party.” *See Space Center, Inc. v. 451 Corp.*, 298 N.W.2d 443, 451 (Minn. 1980) (first breaching party cannot use other party's subsequent breach to avoid liability); 17A C.J.S. Contracts § 458 (1963) (“party who commits the first breach is . . . deprived of the right to complain of a subsequent breach by the opposite party”). The first breach serves as a defense against the subsequent breach.” *Carlson Real Estate Co., Supra.*, 549 N.W.2d at 379-80.

Here, Respondents collectively committed no fewer than five (5) separate breaches of the parties’ Purchase Agreement before any alleged failures on behalf of One Land could have occurred. Moreover, Appellant One Land committed no breaches of the parties’ Agreement.

(1) Breach of Representations and Warranties.

Article VI of the parties’ Agreement provides, at paragraph 6.2:

**ARTICLE VI
REPRESENTATIONS AND WARRANTIES OF SELLER**

6.2 Title to Assets. The Seller has good and marketable title to the Assets and the Real Property, free and clear of any and all liens, charges, easements, mortgages, pledges, claims of ownership, security interests, levies,

attachments, restrictions, leases, and other encumbrances (collectively a "Lien"), except as disclosed in this Agreement or in any exhibit containing permitted exceptions attached hereto.

(TE 24, J. App.- 60). No "Permitted Exceptions" exhibit was attached or included in any regard. *Id.*

It is undisputed that the subject real estate was initially encumbered by three separate easements.¹³ (*See* TE 29, J. App.- 89). The Respondents testified that they knew of the easements before signing the Purchase Agreement, and Respondent Margaret Brickner personally granted a sixty (60) foot ingress and egress easement from Central Avenue and a utility easement. (*See* TEs 13 and 140, J. App.- 29, 166). "Its a common tenet of the law that a person who signs a document is presumed to have read it and know its contents and cannot, thereafter, avoid its obligations by claiming that (he/she) either did not read the document, did not understand it, or that it was not explained to (him/her)." *Best v. Best*, 898 So.2d 559, at *6 (La. App. 3 Cir. 2005)(citations omitted).

It is further undisputed that the Purchase Agreement did not reference any such easements. (*See* TE 24, J. App.- 60). Specifically, the Purchase Agreement in this matter did not include any exhibit which contained permitted exceptions, or any permitted easements. (April 27, 2005 TT (J. Johnson) at P.358). Mr. Johnson testified that "[i]t would be something I would have caught, should have caught", but failed to catch. *Id.* According

¹³ On of which was later found to have been identified in error, and subsequently removed from the August 19, 2002 Title Commitment (*See* TE 29, J. App.- 89) and did not appear in the November 6, 2002 Title Commitment (*See* TEs 40 and 41, J. App.- 103, 107) .

to Respondents' counsel attorney Johnson, the Purchase Agreement was presented by him to his clients "in an incomplete state." (April 27, 2005 TT (J. Johnson) at pp. 359-360). Mr. Johnson admitted that it was his responsibility to make sure that the document was complete, and that he discussed with his law partners at Barna, Guzy and Steffen that a mistake might have been made or that an attachment was missing from the parties' Purchase Agreement. (April 27, 2005 TT (J. Johnson) at P. 360). Mr. Johnson discussed these issues with trial counsel, Mr. Kletscher, and specifically that the permitted exceptions were missing and should have been attached to the Purchase Agreement. *Id.*

From at least January 8th of 2003, to the date of Mr. Johnson's trial testimony, Mr. Johnson had not informed his clients that he had discovered that the Purchase Agreement was missing a document reflecting permitted exceptions. (April 27, 2005 TT (J. Johnson) at pp. 363-364).

The result of Seller's (and their legal counsel's) actions and/or omissions was to place Seller in breach of the Purchase Agreement the moment they signed the document on April 22, 2002, and at the earliest time possible in the parties' contractual relationship:

Q: The instant these clients of yours signed this agreement (TE 24), all three of your clients were in breach of Paragraph 6.2 of the Purchase Agreement, correct?

A: That's correct.

(April 27, 2005 TT (J. Johnson) at P.393). Mr. Johnson also testified as follows:

Q: Every day that followed that the easements remain on the property, these three clients of yours remain in breach, do they not? That's correct, isn't it?

A: Their representation in incorrect.

Q: It's a breach, right?

A: That would be correct.

* * *

Q: The breach continues, it's ongoing, correct?

A: that's correct.

(April 27, 2005 TT (J. Johnson) at P. 394). Respondents' breach of the Purchase Agreement continues to this day. These contractual breaches, and the ongoing nature of the contractual breaches, are not waived by Appellant One Land: Article XII, paragraph 12.3 provides:

12.3 Waivers. No action taken pursuant to this Agreement, including any investigation by or on behalf of either party, shall be deemed to constitute a waiver by the party taking such action of compliance with any representation, warranty, covenant or agreement contained herein, and/or in any ancillary documents. The waiver by either party hereto of a breach of any provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach. The waiver by either party hereto of any condition to its obligations hereunder which is not fulfilled shall not preclude such party from seeking redress from the other party hereto for breach of the terms of this Agreement, except to the extent any such waiver specifically includes any agreement to the contrary.

(TE 24, J. App.- 60).

The offending easements, warranted and represented by Respondents not to exist on the Property, and remain on the Property to the date of Mr. Johnson's trial testimony. (April 27, 2005 TT (J. Johnson) at P. 395). Respondents were as much in breach of the Purchase Agreement on April 27, 2005 as they were on April 22, 2002 when the inaccurate representations and warranties were first made.

This first breach, and series of successive and continuing breaches, alone excuse any and all alleged breaches of the Purchase Agreement by One Land. The Respondents, having committed the first substantial breach of the Purchase Agreement, cannot maintain any action against Appellant One Land for a substantial failure to perform as a matter of law. *Griffen, Supra.; MTS Co., Supra.*

- (2) Breach of Respondents' Obligation to Obtain Title Commitments "As Soon As Possible".

The parties' Purchase Agreement also provides at Article III, paragraph 3.2:

ARTICLE III REAL PROPERTY ACQUISITION

3.2 Title. As soon as possible after execution of this Agreement, Seller, at its sole cost and expense, shall deliver to Buyer for Buyer's approval a Commitment for the issuance of an ALTA owner's policy of title insurance issued by Seller's choice (the "Title Company"), certified to date and to include proper certifications for searches covering bankruptcies, state and federal tax liens, judgments, unpaid taxes, assessments and pending assessments ("Title Evidence"). Buyer shall be allowed twenty (20) days after receipt of the last of such Title Evidence for examination and the making of any objections to the marketability of the title, such objections to be made in writing or deemed waived. If any objections are so made, Sellers (sic) shall be allowed sixty (60) days from the receipt of notice if such objections to make title marketable.

(TE 24, J. App.- 60).

The obligation to procure and pay all costs for the title insurance and commitments was the obligation of the Respondents/Seller. (April 27, 2005 TT (J. Johnson) at P. 409; TE 24, J. App.- 60). Mr. Johnson testified "as soon as possible after execution of this Agreement" as reflected in Article III, paragraph 3.2 meant: "[s]hortly after execution of the

purchase agreement.” (April 27, 2005 TT (J. Johnson) at P. 414). It was also Mr. Johnson’s opinion that “shortly” meant “[a] week”. (April 27, 2005 TT (J. Johnson) at P. 415). Mr. Johnson then admitted that “[t]here is a point in time” when this Seller becomes in breach of the Article III, paragraph 3.2 language of the Purchase Agreement by not getting the title work done “as soon as possible”. (April 27, 2005 TT (J. Johnson) at P. 416).

It is undisputed that Plaintiffs/Seller did not procure the title work until nearly five months later when on September 18, 2002 Ms. Cindy Braam first dropped off the title abstracts.¹⁴ (See TEs 151 and 36(delivery receipt)). Land Title Company thereafter officially opened their file on this matter on September 22, 2005, on the five month anniversary date of the Purchase Agreement. (See TE 64). It is also undisputed that the August 19, 2002 Title Commitment was not delivered to Mr. Gambucci and One Land until October 11, 2002. (April 27, 2005 TT (J. Johnson) at P. 415; TE 39(Ms. Cindy Braam notes delivery of the title commitment to Mr. Gambucci on October 11, 2002)).

One Land respectfully submits this delay to constitute the second breach of the Purchase Agreement. Appellant One Land is not alleged to have breached any terms or conditions of the parties’ Purchase Agreement to October 11, 2002.¹⁵

¹⁴ Forgetting one of the lot abstracts.

¹⁵ The only breach of contract alleged by Respondents to have been committed by Appellant One Land was failure to close the transaction by November 22, 2002 pursuant to demand dated November 12, 2002. (See Respondents’ Joint Complaint in this matter, Count III, paragraph 7, J. App.- 1; Respondents’ Notice of Cancellation, TE 44, J. App.- 113).

(3) Breach of Obligation to Afford One Land Twenty (20) days to Object to Last Title Commitment/Evidence of Title.

It is undisputed that the title commitments were the “evidence of title” referenced in the Purchase Agreement. (April 26-27 TT (D. Tonseth) at P. 73; April 27, 2005 TT (J. Johnson) at P. 400). The August 19, 2002 Title Commitment was not the last commitment issued by Land Title. (April 26-27, 2005 TT (D. Tonseth) at P. 73; *See* TE 29, 30 and 40, J. App.- 89, 94 and 103).

It is further undisputed that both title commitments issued by Land Title on behalf of Respondents/Seller, were filled with errors. (*See* TE 29, 30, 40 and 41, J. App.- 89, 94, 103 and 107). These errors, aside from the easement issues noted above, included (1) mixing up the buyer and seller in numerous paragraphs, (2) failing to include required ALTA insuring provisions¹⁶; errors in the legal description¹⁷; and (3) incomplete information as the abstract for lot 3 was not delivered by Ms. Cindy Braam when she originally dropped off the Property abstracts.¹⁸ *Id.* Mr. Tonseth admitted to the numerous errors, and testified that the errors needed to be corrected in subsequent title commitments.

¹⁶ Each of these title commitments included the legend at the bottom of the front page: “[t]his commitment is invalid unless the Insuring Provisions as Schedules A and B are attached.” (*See* Exhibits 29, 30, 41, 42, and 39).

¹⁷ Land Title representative Don Tonseth attempted to correct by hand and add “No-88” to the legal description of the August 19, 2002 Title Commitment. (*See* Exhibit 41).

¹⁸ Mr. Tonseth indicated in Exhibit 39 the following caveat: “[t]his commitment was based on the review of an abstract for lots 1 & 2. Lot 3 was searched at the county was (sic) not available at the time the exam was done. I will review the abstract for lot 3 & make any changes as necessary. Don.”

Land Title thereafter issued another title commitment on behalf of Respondents/Seller on November 6, 2002, which was picked up by One Land on November 15, 2002. (See Exhibit 40). Unfortunately, the November 6, 2002 Title Commitment contained many of the same errors that were contained in the August 19, 2002 Title Commitment. (See Exhibits 29, 30, 40 and 41). Only one of the offending easements, however, was removed. (See Exhibits 29 and 41). Given the fact that there remained errors on the November 6, 2002 Title Commitment, it was certain that another one or more title commitment(s) would have needed to be issued. Furthermore, the Property continued to be unmarketable, since the remaining easements were not removed: “[a]n outstanding easement makes title to realty unmarketable in a situation where the title to be conveyed as specified in the contract to purchase has not been made subject to such easement.” *Wertheimer v. Byrd*, 278 Minn. 150, 152, 153 N.W.2d 252 253 (Minn. 1967), citing with approval, *Knudson v. Trebesch*, 152 Minn. 6, 187 N.W. 613 (Minn. 1933); C.J.S. Vendor and Purchaser, section 206, 208. So long as the easements remained upon the Property, the land remained unmarketable as a matter of law.

Land Title never got the chance to correct the error on the November 6, 2002 Title Commitment. In addition, One Land never got the chance to object to the continuing errors, including the continuing presence of the unacceptable easements upon the Property. Respondents/Seller sent their Notice of Default letter on November 12, 2002. (See TE 42, J. App.- 111). One Land had effectively been denied its contractual right of its twenty (20) day objection. Breach number three is complete upon the sending of the November 12, 2002

default letter in which Respondents'/Seller's intentions are clear as to any ongoing cooperation or performance under the Purchase Agreement by Respondents.

(4) Breach of Closing Date in Accord with One Land's Extension.

According to Article V, paragraph 5.1 of the Purchase Agreement:

**ARTICLE V
CLOSING**

5.1 Time and Place of Closing. The Closing on the purchase and sale herein provided (the "Closing") shall take place not later than thirty 30 days after the expiration of the Approval Period, at the offices of counsel for the Seller and shall be effective as of the close of business on the actual day of Closing. On or before the expiration of the Approval Period, Buyer shall have the right to either (I) terminate this Agreement with the Earnest Money retained by Seller or (ii) to extend the Approval Period once for Sixty (60) days upon written notice to Seller and payment of \$20,000.00 in additional Earnest Money. Upon such extension, the \$35,000.00 of Earnest Money deposited at the execution hereof shall become non-refundable to Buyer, but applicable to the Purchase Price at Closing.

(TE 24; J. App.- 60).

One Land possessed a contractual 120-day "Governmental Approval" period from April 22, 2002. *Id.* One Land successfully extended the closing date in this matter pursuant to Article V, paragraph 5.1 of the Purchase Agreement, paying to Seller the sum of \$20,000.00. (May 12-13 , 2005 TT (T. Gambucci) at pp. 88-89; April 26-27, 2005 TT (C. Braam) at P. 4; *See* TEs 18, 19 and 31, J. App.- 50, 51 and 52). According to Article III, paragraph 3.2 of the Purchase Agreement, One Land possessed a twenty (20) day right, upon receipt of the last evidence of title commitment, to object to the marketability of the title.

(TE 24, J. App.- 60).¹⁹ Using November 15, 2002 as the delivery date of the true last evidence of title commitment to One Land, The closing date should have been December 5, 2002. Unfortunately, One Land was denied its twenty (20) day objection rights upon the Respondents' November 12, 2002 letter demanding that the matter close on or before November 22, 2002, effectively repudiating the Purchase Agreement, cutting short One Land's objection period. (See TE 42, J. App.- 111).

A repudiation occurs when “[a] contracting party’s words or actions . . . indicate an intention not to perform the contract in the future; a threatened breach of contract.” Black’s Law Dictionary, *Repudiation*, P. 1306 (7th Ed. 1999). “A repudiation is (a) a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach . . .” *Id.* The Minnesota Supreme Court has ruled that:

. . . [i]t is well settled that where one party repudiates the contract, the other party has an election to pursue one of three remedies: (1) To treat the contract as rescinded and avail himself of the remedies which may be based on a rescission; (2) to treat the contract as still binding and wait until the time arrives for its performance and then sue and recover under the contract; (3) to treat the renunciation as an immediate breach and sue at once for any damages which he may have sustained.

Greer v. Kooiker, 312 Minn. 499, 512, 253 N.W.2d 142, 142 (1977); citing with approval, *Engel v. Mahlen*, 153 Minn. 1, 4, 189 N.W. 422, 423 (1922). The doctrine of anticipatory breach applies to contracts to convey land. *Greer, Supra.*, 312 Minn. at 512, 253 N.W.2d at

¹⁹ Thereafter, Respondents/Seller have sixty (60) days to cure defects. (TE 24, J. App.- 60).

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One Land was not in violation or default of any term or condition of the Agreement at any time. Further, Respondents' arbitrary establishment of a November 22, 2002 Closing Date was knowingly contrary to the Purchase Agreement to "set up" One Land: "[a] repudiating party cannot set up the other party's subsequent nonperformance or a breach to avoid liability for its own prior total breach." *See Space Center, Inc., Supra.*, 298 N.W.2d 443 at 451; *accord*, Restatement (Second) of Contracts §237 (1981)("it is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time").

In addition to the above regarding One Land's complete excusal from further required performance under the Purchase Agreement, Respondents' repudiation of the Purchase Agreement via Letter dated November 12, 2002 absolves One Land from any contention that any failure of One Land to object to the last evidence of title commitment, received from Respondents on November 15, 2002, beyond the November 22, 2002 Closing Date improperly demanded by Respondents. Further, One Land could not be deemed in default of any terms and conditions of the Purchase Agreement, as a matter of law, until Respondents removed the easements upon the Property.

One Land reasonably chose to hire legal counsel and treat the contract as still binding upon Respondents/Seller, and wait until Respondents addressed their prior breaches of the

Purchase Agreement. In addition, it was reasonable to expect that a third title commitment would be forthcoming, given all of the errors that remained on the November 6, 2002 Title Commitment from the August 19, 2002 Title Commitment. (See TEs 29, 40 and 41, J. App.- 89, 103 and 107). Respondents/Seller failed to correct their breaches of the Purchase Agreement, and proceeded instead to attempt a sale to third-party Town Center. (See TE 48, J. App.- 121).

(5) Breach of Covenant of Good Faith and Fair Dealing.

Respondents' conduct as above set forth prevented One Land from closing upon the Purchase Agreement. Instead of performing upon their obligations under the Purchase Agreement, Respondents proceeded to attempt a cancellation of the Purchase Agreement and re-sale of the Property to a third party, Town Center. (See TE 48, J. App.- 121). Good faith and fair dealing would clearly dictate that Respondents make a good faith attempt to remove the offending easements, provide a complete and accurate title commitment/last evidence of title, and establish a closing date consistent with the Purchase Agreement. Good faith and fair dealing would also have dictated an effort to work with Appellants' legal counsel in January of 2003 (April 27, 2005 TT (J. Johnson) at pp. 383-385), in an effort to still close the transaction. Respondents purposely took none of these steps. As such, Respondents breached the implied covenants of good faith and fair dealing.

III. RESPONDENTS' CANCELLATION OF CONTRACT WAS VOID AT ITS INCEPTION

Article IX, "Termination", at paragraph 9.1 of the Purchase Agreement provides:

**ARTICLE IX
TERMINATION**

9.1 By Seller. If Buyer defaults in the performance of this Agreement, Seller may cancel this Agreement upon thirty (30) days notice given pursuant to Minnesota Statutes Section 559.21, and the payments made by Buyer to Seller shall be deemed the liquidated damages hereunder, and may be retained by Seller free of any claim by Buyer. This provision shall not deprive Seller of any other remedies provided by law, including enforcement of specific performance.

(TE 24, J. App.- 60).

1. Contractual Remedies.

As noted above, One Land cannot be in breach and/or default of the parties' Purchase Agreement as a matter of law, as its performance has been excused by Respondents' prior breach(es) and repudiation(s). One Land cannot be in any default as required by paragraph 9.1. Respondents have otherwise identified no valid breaches of contract by Appellant One Land having breached first (or at all).²⁰ In addition, Respondents November 22, 2002 Closing Date amounts to a further breach/repudiation of the Purchase Agreement by Respondents. As such, Respondents have no "Buyer Default" to rely upon for invocation of any paragraph 9.1 contractual termination remedies.

²⁰ The only ground for cancellation cited by Respondents is "[f]ailure to close not later than November 22, 2002, pursuant to the terms of the Purchase Agreement." (TE 44, J. App.- 113).

Nor can Respondents avail themselves of any other benefits of 9.1, having pre-breached and repudiated the Purchase Agreement. *See Griffen, Supra*. At the time of this action commenced by Respondents, Respondents' attorney has admitted that the prior breach as to representations and warranties was continuing and ongoing. (*See* April 27, 2005 TT (J. Johnson) at P. 394). This is why One Land contends that Respondents asserted a claim for Declaratory Judgment in this action – to have the court determine rights and liabilities under the Purchase Agreement. (*See* Complaint, J. App.- 1). Respondents could not otherwise maintain any action against One Land as Respondents are prohibited from asserting their contractual allegations *ab initio*, as a matter of law. *See Carlson Real Estate Co., Supra*.

2. Statutory Remedies.

Where a party's repudiation of a contract is continuing and ongoing, the breaching party's repudiation of the contract was not "effectively withdrawn" so as to deny the non-repudiating party the right to recover damages. *Tarpy v. Nowicki*, 286 Minn. 257, 263-64, 175 N.W.2d 443, 448 (Minn. 1970). In *Tarpy*, the party found to have repudiated a real estate contract for deed and initiated Minnesota Statute §559.21 cancellation of contract proceedings contended that "the cancellation effectively removed from the transaction any grounds which might support plaintiff's action for damages growing out of the breach." *Id*. In rejecting this position, the Minnesota Supreme Court held: "[t]his asserted error presupposes that the contract was properly cancelled and that plaintiff-purchaser waited too

long in making an election to rescind and sue for damages.”²¹ *Id.* The *Tarpy* court observed:

[a]s we understand the thrust of defendants' argument, it is that, even though the vendors may have repudiated the contract by their actions, the effect of the cancellation proceedings was to remit the breach and impose upon the vendee, if she wished to salvage her interest, the obligation of reinstating the contract pursuant to the attempted notice. This contention is answered by evidence that the vendors continued their repudiation of the contract by occupancy and collection of rents during the time the cancellation proceedings were pending. Under the circumstances, the vendors' repudiation of the contract was not effectively withdrawn so as to deny the vendee the right to recover damages.

Tarpy, Supra., 286 Minn. 257 at 264, 175 N.W.2d at 448.

Here, the repudiation occurred via Respondents' November 12, 2002 letter repudiating the Purchase Agreement and One Land's rights to 20-day objection to last evidence of title and regarding the Closing Date. (*See* TE 42, J. App. 111). The repudiation continues, and is ongoing. This is addition to the continuing and ongoing repudiation regarding the false warranties and representations as to easements upon the Property.

The above analysis further prohibits Respondents from asserting statutory rights of cancellation. *See Id.* Moreover, “default” is the threshold requirement that allows a vendor to even invoke statutory cancellation. *Coddon v. Youngkrantz*, 562 N.W.2d 39, 42 (Minn.

²¹ The non-repudiating party was afforded the three legal remedies upon repudiation, (1) To treat the contract as rescinded and avail himself of the remedies which may be based on a rescission; (2) to treat the contract as still binding and wait until the time arrives for its performance and then sue and recover under the contract; and (3) to treat the renunciation as an immediate breach and sue at once for any damages which he may have sustained. The non-repudiating party chose option (1), to rescind. *See Tarpy v. Nowicki*, 286 Minn. 257, 263, 175 N.W.2d 443, 447-448 (Minn. 1970).

Ct. App. 1997)(involving a 60-day statutory default period). Even then, only a material breach or a substantial failure in performance gives the seller a right to terminate. *Id.*

In *Coddon*, the court strongly criticized the effects of cancellation of a contract which included loss of buyer's down-payments, loss of subsequent payments and which relieved the seller from his agreement to convey the property, calling such a result "inequitable" and "absurd", even though the buyer was in technical default for missing some payments. *Id.*, at 43. The *Coddon* court further observed that the parties to such a transaction are bound by a covenant of good faith and fair dealing inherent in the contract. *Id.* at 43. The Court also noted that: "(the seller) cannot benefit from a default he helped create" and that "vendors of (contracts in real estate) must exercise their rights in good faith; where they act in such a manner to prevent vendee's performance, they cannot claim a default until they have afforded the vendee a reasonable opportunity to perform." *Id.* (Citations omitted).

Lastly, the Minnesota Court of Appeals in *Coddon* noted:

We also recognized (in *O'Meara v. Olson*, 414 N.W.2d 563, 564 (Minn. Ct. App. 1987)) that strict application of statutory cancellation could be unjust. If the theory of the (vendor) were followed, a full hearing on the merits in open court subject to appellate review would be preempted by summary, non-judicial cancellation enforced by the vendor. This would thwart the purpose of the statute – protection of vendees – and lead to an absurd result. (*Id.* at 567). We have rejected the argument that equity is powerless to interfere with the vested cancellation rights of a contract vendor: However drastic the statutory procedure, it cannot be that the legislature intended equity to be entirely powerless and deprived of all its former beneficent Jurisdiction in such matters. * * * It is because we are confident that the legislature did not intend such complete tying of hands of equity that we are using its power here.

Id. at 44, citing with approval, *D. J. Enterprises of Garrison, Inc. v. Blue Viking, Inc.*, 352

N.W.2d 120, 121-22, (Minn. Ct. App. 1984), *review denied*, (Minn. Oct. 11, 1984), quoting *Follingstad v. Syverson*, 160 Minn. 307, 311-12, 200 N.W. 90, 92 (1924). The Court determined that: “expiration of the statutory redemption period does not divest a district court of jurisdiction to consider a vendee’s equitable claims.” *Coddon, Supra.*, 562 N.W.2d at 39. In addition, a clause limiting a party’s right to seek equitable remedies in a contract for the sale of real estate, if not initiated within 6 months, has been held in one instance to be unconscionable. *Flynn v. Sawyer*, 272 N.W.2d 904, 908 (Minn. 1978).

3. Absent Parties (“Seller” Not Complete).

One Land also asserts that Respondents counsel was missing two of the parties necessary for cancellation to be valid under paragraph 9.1 of Article IX of the Purchase Agreement (“Seller”). Mr. Johnson acknowledged that if there is a party missing from the cancellation procedure, the cancellation is invalid. (April 27, 2005 TT (J. Johnson) at P. 386). In this case, Mr. Johnson was missing Ms. Brickner and the Thomas E. Brickner Credit Trust in his contract cancellation action.

In deposition testimony originally dated September 2, 2004, elicited in the Trial Record, Ms. Brickner (and on behalf of the Trust) indicated that she did not speak directly with Mr. Johnson or anyone from Mr. Johnson’s law firm. (April 26-27, 2005 TT (M. Brickner) at P. 174). Ms. Brickner never received any letters from Mr. Johnson or anyone from his law firm. *Id.* There is no written retainer agreement with Mr. Johnson or his law firm. *Id.* Attorney Jeffrey Johnson did not provide any legal services to the Thomas E.

Brickner Credit Trust. (April 26-27, 2005 TT (M. Brickner) at P. 193). Ms. Brickner never saw any cancellation documents prior to the litigation, did not provide any information contained in the cancellation documents, and had no idea what was even contained in the cancellation documents. (April 26-27, 2005 TT (M. Brickner) at pp. 187-188). Ms. Brickner had no idea to whom the cancellation documents were sent. (April 26-27, 2005 TT (M. Brickner) at P. 189). Ms. Brickner, as trustee for the Thomas E. Brickner Credit Trust, has no agreements with Respondent Cynthia Braam to provide services on behalf of the Trust, and does not make any decisions on behalf of Ms. Brickner or the Thomas E. Brickner Credit Trust. (April 26-27, 2005 TT (M. Brickner) at P. 191-192). About a month later after giving this deposition testimony, under oath, Ms. Brickner and her attorney met and created an Errata sheet affidavit, which substantially and substantively changed many answers from yes to no, no to yes, and added substantial new text to the previous answers. (April 26-27, 2005 TT (M. Brickner) at pp. 194-203; *See* TE 125). “Clarification” was cited as justification for the substantive changes and additions. *Id.*

“A self-serving affidavit that contradicts earlier damaging deposition testimony is not sufficient to create a genuine issue of material fact.” *Banbury v. Omnitriton Intern, Inc.*, 533 N.W.2d 876, 881 (Minn. Ct. App. 1995), citing with approval, *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1365 (8th Cir.1983). In *Camfield*, the Eighth Circuit offered the following rationale in the context of summary judgment:

If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own earlier testimony, this would

greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.

Id.; accord, *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 925 F.2d 566, 572 (2d Cir. 1991) ("party may not . . . create a material issue of fact by submitting an affidavit disputing his own prior sworn testimony"); *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 543-44 (9th Cir. 1975) (inconsistent statements of party did not create genuine issue of fact).

Here, there was no mention in TE 125 that Ms. Brickner was "confused" or did not understand the question(s). (See TE 125). The sham Errata affidavit should have been disregarded, and the Trial Court's refusal to do so was clearly erroneous. Respondent Margaret Brickner's errata sheet reversing her deposition testimony does not change the facts of her deposition; neither she nor the Trust were involved in any way in the contract cancellation as required by Article IX of the Purchase Agreement. This is aside from the fact that Ms. Brickner participated in a sham, after meeting and preparing the affidavit with her legal counsel.

The purported cancellation was also void for including personal property in with the Property: "[t]he statute makes no reference to contracts for the sale of personal property . . . we will assume that the statute is limited in its application to contracts for the sale of land only." *Robitshek Inc. Co. v. Wick*, 171 Minn. 127, 128, 213 N.W. 551, 552 (Minn. 1927). The cancellation was void as to the Sandee's restaurant and its assets, as a matter of law.

IV. ONE LAND DID NOT ABANDON ITS RIGHTS UNDER THE PURCHASE AGREEMENT

Abandonment Standard.

“Abandonment is defined as a voluntary relinquishment of an interest by the owner with the intent of terminating his ownership . . . [a] finding of abandonment depends upon the intentions of the parties and is not predicated on any single factor, but on all of the facts and circumstances concerning the owner's relationship with the subject property and the seller. *Loppe v. Steiner*, 699 N.W.2d 342, 350 (Minn. Ct. App. 2005)(citations omitted). “A short delay in payment or break in communication among the parties does not, absent other circumstances, justify a finding of abandonment.” *Id.* “A ‘party seeking to prove abandonment of a contract must present clear and convincing evidence of an intention by the other party to abandon its rights.’” *Id.*, (citations omitted).

“The intention to abandon a contract may be found ‘from the facts and circumstances surrounding the transactions and may be implied from the acts of the parties . . . [a]bandonment ‘must be clearly expressed, and acts and conduct of the parties to be sufficient must be positive, unequivocal, and inconsistent with the existence of the contract.’” *id.*, (Citations omitted).

In general, no abandonment was found (1) where the vendee failed to tender payment for 4 months; *Melco Investment Co. v. Gapp*, 259 Minn. 82, 86, 105 N.W.2d 907, 910 (Minn. 1960)(“Nor do we feel that, under the circumstances here, the delay of 4 months sufficiently establishes an intent to abandon ... this relatively brief period of time”); or (2) for

a party who waited for five months before seeking specific performance; *Buresh v. Mullen*, 296 Minn. 150, 207 N.W.2d 279 (Minn. 1973). A delay of eighteen (18) months was determined to constitute an abandonment, but only after the court found that equitable consideration of bad faith and laches constituted sufficient reason for refusing relief. *Boulevard Plaza Corp. v. Campbell*, 254 Minn. 123, 135-36, 94 N.W.2d 273, 283 (Minn. 1959). In this regard, “[t]here must be other circumstances present, such as, for instance, a lengthy lapse of time, in order that the intent to abandon may properly be inferred.” *Melco Investment Co., Supra.*, 259 Minn. at 85, 105 N.W.2d at 909. “The main question to be determined is whether the defendant will be prejudiced--whether he will be placed in a position to suffer injury--if the remedy sought is granted. In general, laches depends on whether the delay has been such as to make it inequitable to grant the desired relief.” *State ex rel. Petersen v. Bentley*, 216 Minn. 146, 160, 12 N.W.2d 347, 355 (Minn. 1943).

Respondents’ abandonment claim is an equitable defense. *Ryan v. Minneapolis Police Relief Ass’n*, 251 Minn. 250, 255, 88 N.W.2d 17, 21 (Minn. 1958). It is well settled that “[o]ne seeking an equitable remedy” is required to “come into equity with clean hands.” *Marso v. Mankato Clinic, Ltd.*, 278 Minn. 104, 117, 153 N.W.2d 281, 290 (Minn. 1967).

Again, based upon the many breaches and repudiation of the Purchase Agreement by Respondents in this matter, Respondents in no way entered the trial court forum with “clean hands”. Respondents accordingly are prohibited from asserting equitable defenses, and the Court’s findings based thereon are clear error, and reversible as a matter of law.

Furthermore, it is undisputed that One Land paid to Respondents \$35,500.00 in Earnest Money, extension sums and attorney fees. As noted above, One Land invested a great deal of time, expense and effort to meet with architects and prepare the Property for development. After receiving Respondents' November 12, 2002 letter demanding a closing on or before November 22, 2002, One Land continued to work on the project, plan development of the site and meet with Appellant Duckwall. Mr. Gambucci and One Land continued to look at other projects and designs, and hired attorney Schoonover to pursue a closing date. (*See* TE 46, J. App. 120).

One Land aggressively prosecuted its rights in all court proceedings and at trial, incurring a substantial amount in attorney fees and costs. None of these acts even remotely suggest that One Land intended to relinquish its rights in the Purchase Agreement, far short of such intent being clear and convincing. In fact, these facts indicate an opposite intent.

Further, Respondents would have suffered no prejudice by closing with One Land and/or Mr. Duckwall (save for the additional "windfall" Respondents would receive by their re-sale of the Property to Town Center.) The Trial Court clearly erred in finding abandonment.

V. EXPERT CLARK GOSET'S DAMAGE CALCULATIONS WERE SUFFICIENTLY DEFINITE TO AWARD APPELLANTS DAMAGES CONSISTENT WITH MR. GOSET'S OPINIONS.

Evidence of Damages.

There is no general test of remote and speculative damages, and thus, such matters usually should be left to the judgment of the trial court. *Olson v. Aretz*, 346 N.W.2d 178, 183 (Minn. Ct. App. 1984, citing with approval, *Jackson v. Reiling*, 311 Minn. 562, 563, 249 N.W.2d 896, 897 (Minn. 1977)). In addition, “[n]otwithstanding . . . uncertainty, a wrongdoer who is found to have caused harm should not be allowed to complain of the uncertainty of proof of damage if his own wrongdoing has caused the uncertainty.” *Willmar Gas Co. v. Duininck*, 236 Minn. 499, 506, 53 N.W.2d 225, 229 (Minn. 1952), citing with approval, *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544. In *Ellis v. Lindmark*, 177 Minn. 390, 397, 225 N.W. 395, 397 (Minn. 1929), the Minnesota Supreme Court stated: “. . . The tendency of the court has been to ascertain damages, when an actual wrong has been done, though doing so involves labor, rather than to deny relief with the easy statement that the damages sought are too speculative and conjectural or too remote to permit a recovery.” *Willmar Gas Co. v. Duininck, Supra*, 236 Minn. 499, 506, 53 N.W.2d 225 at 229; citing *Ellis v. Lindmark, Supra*, 177 Minn. at 397, 225 N.W. at 397 See also, *Watre v. Great Northern Ry. Co.*, 127 Minn. 118, 149 N.W. 18 (Minn. 1914).

Here, Appellants’ damages are inherently speculative due to the wrongful acts of the

Respondents. It is undisputed that the subject assets and real property have not, to date, been transferred to Appellants, or either of them. Appellants have been prevented from realizing their contractual benefits, proof of which would not be as speculative had Respondents performed upon their written promises and warranties. In short, Respondents have caused the very uncertainty the Trial Court found against Appellants. Appellants are further entitled to a full accounting of all amounts realized upon the premises during Respondents' wrongful period of retention. *See Bumann v. Maurer*, 203 N.W.2d 434, 438 (N.D. 1972).

Again, it is undisputed that One Land has paid to Respondents the sums of \$35,000.00 and \$500.00, all of which were accepted and utilized by Respondents. None of these amounts have been refunded to One Land by Respondents. Mr. Goset capably and competently testified to losses occasioned by Respondents' wrongful conduct, including value of the use of the property for the time of such wrongful occupation, and including lost profits from Sandee's restaurant. (*See* TE 161 and Goset Profit Summary, J. App. 168, 170).

One Land sought the equitable remedy of specific performance of the parties' Purchase Agreement. In addition, One Land sought equitable damages for the loss of value to the contract occasioned by Respondents' wrongful re-zoning of and/or failure to remove the easements from, the parcel(s), reducing the number of units capable of being constructed upon the premises. "In an action for specific performance, a purchaser may recover damages from a seller for delay in conveying real property and the costs, if any, of recovering possession of the land." *Matrix Properties Corporation v. TAG Investments*, 644 N.W.2d

601, 605 (S. Ct. N.D. 2002). It is well-settled that the object of a court of equity is to place parties who are not at fault as nearly as possible in the same position they would have been in if there had been no default by the other party. *Id.*, at 609. In this regard, it is a “fundamental principal”, that “a court acting in equity has broad latitude with which to fashion remedies to suit each particular case.” *Rock v. Hennepin Broadcasting Associates, Inc.*, 359 N.W.2d 735, 739 (Minn. Ct. App. 1984), *see also, Beliveau v. Beliveau*, 217 N.W.2d 235, 245, 14 N.W.2d 360, 366 (Minn. 1944).

VI. THE TRIAL COURT ERRED IN DENYING ONE LAND’S MOTION TO AMEND TO INSERT A CLAIM FOR PUNITIVE DAMAGES.

The court will grant an amendment for punitive damages if prima facie evidence exists alleging defendant acted with “willful indifference.” *Shetka v. Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 918 (Minn.1990); *See Mrozka v. Archdiocese of St. Paul & Minneapolis*, 482 N.W.2d 806, 812, *review denied*, (Minn. Ct. App. 1992)(explaining that “willful indifference” includes reckless or knowing disregard of plaintiffs’ rights or safety); *See also Backlund v. City of Duluth*, 176 F.R.D. 316 (D.Minn,1997)(a “willful” act is one done intentionally, knowingly and purposely, without justifiable excuse); *See also Bougie v. Sibley Manor*, 504 N.W.2d 493, (Minn. Ct. App. 1993) (willful does not require intent to harass so much as a malicious, reckless or knowing disregard).

The term “prima facie”, as used in Minn. Stat. §549.191, does not refer to a quantum of evidence, but to a procedure for screening out unmeritorious claims for punitive damages. *Thompson v. Hughart*, 664 N.W.2d 372, 377 (Minn. Ct. App. 2003). One Land is therefore

not technically required to provide clear and convincing evidence of willful indifference to support a motion to amend a complaint to allege punitive damages. It is only necessary to show that there is a prima facie case to satisfy the willful indifference criteria. To meet the burden of proof movant needs only to produce evidence sufficient on its face to support a judgment in their favor. *See Swanland v. Shimano Indus. Corp., Ltd.*, 459 N.W.2d 151, 154 (Minn. Ct. App. 1990)(“[A] prima facie case simply means one that prevails in the absence of evidence invalidating it.”)(quoting *Blumberg v. Palm*, 56 N.W.2d 412, 415 (1953); *See also Northwest Airlines, Inc. v. American Airlines, Inc.*, 870 F. Supp. 1499, 1502-03 (D. Minn. 1994) (the court should consider evidence proffered by Plaintiffs without regard for cross-examination or other challenge); *See also Berczyk v. Emerson Tool Co.*, 291 F. Supp.2d 1004 (D. Minn. 2003) (under Minnesota law, plaintiff need only demonstrate an entitlement to allege punitive damages, not an entitlement to the damages themselves) (emphasis added).

One Land respectfully submits that such a prima facie case exists in this case as pleaded and above set forth, and that the Trial Court’s denial of same was error.

VII. THE TRIAL COURT MADE REVERSIBLE CLEARLY ERRONEOUS ERRORS OF FACT AND ERRORS OF LAW.

A. Clearly Erroneous Findings of Fact (J. App.- 217).

13. On October 11, 2002, One Land Development Company received a Title Commitment with an effective date of August 19, 2002. Sellers did not receive any written objections to this title commitment.
14. Mr. Tonseth testified that Mr. Gambucci did not have any concerns about the two easements on the property. The only concern Mr. Gambucci had was about a third easement that was mistakenly listed on the Title Commitment.

This court finds Mr. Tonseth credible as to this issue.

The August 19, 2002 Title Commitment could not have been the “last evidence of title” received from Respondents Pursuant to the Purchase Agreement; Respondents issues a second title commitment dated November 6, 2002. The November 6, 2002 Title Commitment was itself, full of errors; a third title commitment would have been necessary. Also, One Land’s contractual obligations were excused as a matter of law due to Respondents’ breaches.

15. A Second title commitment dated November 6, 2002 was then issued correcting the objected to easement from the August 19, 2002 Title Commitment. No timely objections to the November 6, 2002 Title Commitment were made by either Defendant.

One Land was not given the twenty-day objection period of the Purchase Agreement, and Respondents repudiated the Purchase Agreement demanding a November 22, 2002 closing date via Trial Exhibit 42. (*See* TE 42, J. App.- 111). Further, One Land’s performance was excused as a matter of law.

21. On December 9, 2002, Sellers served a Notice of Cancellation on One Land Development Company, which gave One Land Development Company until January 8, 2003 to close on the Purchase Agreement. Barna, Guzy & Steffen represented the Sellers in drafting and serving the Notice of Cancellation.

The cancellation of the Purchase Agreement was invalid (see above).

23. Margaret Brickner testified at trial that Cindy Braam notified her of their intent to cancel the Purchase Agreement with One Land Development Company and that she agreed to cancel the agreement. This Court finds that Margaret Brickner was credible as to this issue and that Margaret Brickner authorized the cancellation of the Purchase Agreement. Therefore, all Sellers authorized the Notice of Cancellation.

This finding is contrary to the clear evidence, with Respondent Margaret Brickner's sham Errata affidavit stricken. (See TE 125).

One Land seeks reversal of the Court's Findings of Fact as clearly erroneous, upon review of the facts and law cited herein.

B. Errors of Law (J. App.- 217).

The Trial Court's Conclusions of Law stated in reference to Counts 1, 2, 3, 6 of Respondents' Complaint are not in accord with the law (see above). Further, the Trial Court's Conclusions of Law stated in reference to Counts 1, 2, 3 and 4 are equally not in accord with the law as provided above. Any Conclusions of Law citing One Land's failure to avail itself of contractual remedies (e.g., Article IX, paragraph 9.2) were excused. In addition, any sixty (60) day limitation period was unenforceable as a matter of law. Such contractual limitations "are not favored and are strictly construed against the invoking party." *O'Reilly v. Allstate Ins. Co.*, 474 N.W.2d. 221, 222 (Minn. Ct. App. 1991), citing with approval, *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 651 (Minn. 1986).

One Land respectfully requests *de novo* review of same, and reversal.

CONCLUSION

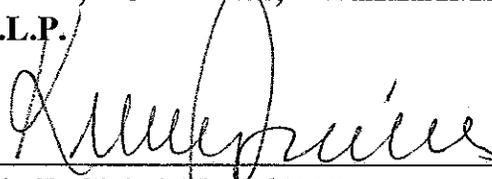
For all of the foregoing reasons, Appellant One Land Development Company respectfully seeks reversal of the Trial Court's Findings of Fact, Conclusions of Law and Order for Judgment in this matter.

In the alternative, Appellant One Land Development Company respectfully seeks a new trial, all upon the files, records and proceedings herein, including Appellant John Duckwall's Brief and Joint Appendix in this matter, which is incorporated herein by reference.

Dated this 4th day of February, 2007.

Respectfully submitted,

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