STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0207

D.R. Horton, Inc.-Minnesota,
a Delaware corporation,
Appellant

vs.

Frederick Radintz, et al.,
Respondents,

Carla Manuel, et al.,
Respondents.

Filed February 12, 2008
Reversed and remanded
Wright, Judge

Hennepin County District Court
File No. 27-CV-06-2896

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Considered and decided by Peterson, Presiding Judge; Wright, Judge; and Ross, Judge.

U N P U B L I S H E D O P I N I O N

WRIGHT, Judge

This appeal involves a contract dispute between appellant D.R. Horton, Inc. and numerous individually named respondents, collectively the "sellers."[1] After cross-motions for summary judgment, the district court found that, under the unambiguous terms of the contract, D.R. Horton failed to properly exercise its option to purchase the sellers' land. D.R. Horton challenges the district court's grant of summary judgment in favor of the sellers, arguing that the district court misconstrued unambiguous contract language. We reverse and remand.

FACTS

On January 26, 2001, the sellers and D.R. Horton entered into a written contract in which the sellers granted D.R. Horton an option to purchase approximately 225 acres of land for $16.2 million. The contract permits D.R. Horton to split the transaction into four successive phases. In phase 1, D.R. Horton can purchase a specific portion of the sellers' property for $200,000 plus at least 25 percent of the remaining land for $4.8 million. If D.R. Horton exercises its phase 1 option, each later-phase option continues for the following additional periods: one year for phase 2, two years for phase 3, and three years

[1] After the pleadings, the individual sellers appear to have split into two factions: the Radintz sellers own two-thirds of the equity in the land and the Manuel sellers own the remaining one-third. Although the Manuel sellers continue to oppose the sale, the Radintz sellers now support it. Although the Radintz sellers moved for summary judgment to be entered in favor of D.R. Horton and are named as respondents, they are not parties to this appeal. For clarity and consistency, we will use the term "sellers" to refer to any combination of individually named respondents adverse to D.R. Horton, which includes all the respondents before the split and only the Manuel sellers thereafter.

for phase 4. The later three phases permit D.R. Horton to purchase minimum percentages of the remaining land and do not require D.R. Horton to purchase any specific parcel. But D.R. Horton cannot acquire "usable land" for development, as determined by its engineers, "in a manner disproportionate to the unusable land" in a given phase. As consideration for the option, D.R. Horton paid the sellers an initial $50,000 option fee for the first year, followed by an annual option fee of $75,000 for each additional year the phase 1 option was held open. If D.R. Horton exercised the option, the fees paid would be credited toward the purchase price at the phase 1 closing. If D.R. Horton failed to exercise its option, the agreement would terminate and the sellers could keep all fees that had been paid.

In order to exercise its phase 1 option, D.R. Horton was required to notify the sellers of its intent in writing "within thirty days after the date of the Notice of Government Approval." The "Notice of Government Approval" language is included in a section of the contract that purports to give D.R. Horton the right to seek "any or all of" various approvals, including the "Government Approvals" stated in paragraph 10(b)(1):

> From the date hereof, [D.R. Horton], at its expense, shall proceed with the application for and obtaining of all final and unappealable approvals from the City and any other governmental authority having jurisdiction over the Property as [D.R. Horton] may deem necessary to proceed with [D.R. Horton]'s intended improvements to the property, including without limitation, approval of a final plat, conformance with the comprehensive plan, relocation of the MUSA line to include the Property, zoning approvals and building permits (***"Government Approvals"***). Sellers agree to actively support [D.R. Horton]'s applications.

The contract required D.R. Horton to provide the Notice of Government Approval before January 31, 2003, by notifying the sellers in writing whether D.R. Horton achieved these government approvals before January 31, 2003, or "elect[ed] to waive such matters." Alternatively, if D.R. Horton had not yet received the government approvals by January 31, it could extend the phase 1 option until January 26, 2006, by providing the sellers with a written "Notice of Extension." Under this circumstance, in addition to D.R. Horton's obligation to pay the $75,000 annual option fee, the purchase price would increase by three percent for each additional year the option was extended. It is undisputed that D.R. Horton extended the option on November 5, 2003.[2]

When D.R. Horton attempted to exercise its option to purchase the phase 1 property, the sellers asserted that D.R. Horton had not complied with the terms of the option agreement. It is undisputed that D.R. Horton sent two letters to the sellers before the extended deadline, each of which purports to be an independently valid Notice of Government Approval. In the first letter, dated January 18, 2006, D.R. Horton stated that it was electing to waive its right to seek government approvals. In the second letter, dated January 25, 2006, D.R. Horton stated that it had received the only approval it deemed necessary. The sellers, however, asserted that neither of D.R. Horton's letters was a valid Notice of Government Approval, which was a condition precedent to D.R. Horton's right to exercise the option. The sellers also asserted that D.R. Horton failed to

[2] D.R. Horton sent the Notice of Extension several months after the contractual deadline to do so. The contract entitled D.R. Horton to written notice of this default and ten days to cure after receiving the written notice. D.R. Horton sent the required Notice of Extension several days after the sellers provided written notice of the default, and the sellers continued to accept D.R. Horton's option fees.

provide adequate notice of the specific parcels it intended to include in the minimum-percentage portion of the phase 1 property.

D.R. Horton brought an action in district court to enforce the contract, and all parties moved for summary judgment. D.R. Horton maintained that it was entitled as a matter of law to a declaratory judgment that it validly exercised its option and an order for the sellers to specifically perform. The sellers asserted that they were entitled as a matter of law to a declaratory judgment that D.R. Horton failed to properly exercise its option before it expired.

The district court granted summary judgment against D.R. Horton, finding that neither of D.R. Horton's letters complied with the unambiguous terms of the contract. The district court interpreted paragraph 10(b)(1) to require D.R. Horton to obtain "all final and unappealable [government approvals] from the city" that bring the sellers' land "nearer to development" in some "substantial way." The district court found that the January 25 letter was not a valid Notice of Government Approval because the approval D.R. Horton enclosed with the January 25 letter did not bring the land substantially nearer to development. With regard to the January 18 letter, the district court acknowledged that paragraph 10(b)(2) "is quite clear that [prior] to January 31, 2003, [D.R.] Horton retained the right to waive Government Approvals and go forward with Phase 1." But the district court contrasted this provision with paragraph 10(b)(3), which provides additional terms if the option continues after January 31, 2003. Because paragraph 10(b)(3) obligates D.R. Horton to send the Notice of Government Approval within 30 days after receiving the government approvals and, unlike paragraph 10(b)(2),

does not expressly permit D.R. Horton to waive government approvals, the district court inferred that D.R. Horton could not waive government approvals during the extension period. The district court, therefore, concluded that, because the January 18 letter was not a valid Notice of Government Approvals, D.R. Horton's attempt to exercise its option failed. This appeal followed.

D E C I S I O N

D.R. Horton challenges the district court's order denying its motion for summary judgment and granting the sellers' cross-motion for summary judgment.[3] A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [the] party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal from summary judgment, we consider only two questions: (1) whether there are any genuine issues of material fact, and (2) whether a party is entitled to judgment as a matter of law. *Paradigm Enters. v. Westfield Nat'l Ins. Co.*, 738 N.W.2d 416, 418 (Minn. App. 2007).

[3] Although an order denying summary judgment ordinarily is not appealable without a certified question, *McGowan v. Our Savior's Lutheran Church*, 527 N.W.2d 830, 832 (Minn. 1995), D.R. Horton is appealing from the underlying judgment granting the seller's motion, *LeRoy v. Figure Skating Club of Minneapolis*, 281 Minn. 576, 577, 162 N.W.2d 248, 249 (1968) (explaining that appeal from entry of summary judgment must be taken from judgment itself). Because the merits of each party's summary judgment motion are virtually identical, albeit inverse, we may review the merits of the denial of D.R. Horton's motion. Minn. R. Civ. App. P. 103.04 (including "any order involving the merits or affecting the judgment [appealed from]" within scope of review).

Here, the district court granted summary judgment based entirely on its interpretation of the option contract, concluding that the unambiguous contract language entitled the sellers to prevail as a matter of law. A district court's construction of the parties' contract on a summary-judgment motion presents a question of law, which we review de novo. *Id.* at 419. D.R. Horton argues that the district court erroneously concluded that its Notice of Government Approval was invalid because the option was not conditioned on D.R. Horton actually receiving any government approval. Rather, D.R. Horton argues, the contract unambiguously gives it unfettered discretion to determine what government approvals it could seek, including no government approval whatsoever.

In construing any contract, our twin goals are (1) to determine the parties' intent, and (2) to enforce that intent once it has been determined. *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). The parties' intent generally must be ascertained from the four corners of the written contract. *Id.* When the terms are clear, it is improper to go beyond the language of the contract. *Kauffman Stewart, Inc. v. Weinbrenner Shoe Co.*, 589 N.W.2d 499, 502 (Minn. App. 1999). We construe a contract as a whole and attempt to harmonize its component clauses, presuming that the parties intended all of the language to embody their agreement and to have effect. *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525 (Minn. 1990). We will not parse the meaning of individual words or phrases out of context and will avoid interpretations that render a provision meaningless. *Id.* at 526; *Metro Office Parks Co. v. Control Data Corp.*, 295 Minn. 348, 352, 205 N.W.2d 121, 124 (1973).

If the parties have expressed their intent in a plain, clear, and unambiguous writing, no further interpretation is necessary; enforcing the agreement requires us only to apply the terms to the facts, even if doing so produces a harsh result. *Minneapolis Pub. Hous. Auth. v. Lor*, 591 N.W.2d 700, 704 (Minn. 1999). It is incumbent on a party seeking to limit a contractually undertaken risk to ensure that the writing contains clear language for such protection. *Dyrdal v. Golden Nuggets, Inc*., 672 N.W.2d 578, 587 (Minn. App. 2003) (discussing *Krueger v. Farrant*, 29 Minn. 385, 13 N.W. 158 (1882)), *aff'd*, 689 N.W.2d 779 (Minn. 2004).

After examining the contract in its entirety, we conclude that the district court misconstrued the unambiguous language of the contract. The contrast between the express waiver language in paragraphs 10(b)(2) and 10(b)(3) is immaterial because D.R. Horton's right to waive government approvals is not based on either of those provisions. Rather, that right is derived from paragraph 10(b)(1), which defines "Government Approvals" as a product of D.R. Horton's discretion. Paragraph 10(b)(1) provides as follows:

> From the date hereof, [D.R. Horton], at its expense, shall proceed with the application for and obtaining of all final and unappealable approvals from the City and any other governmental authority having jurisdiction over the Property as [D.R. Horton] may deem necessary to proceed with [D.R. Horton]'s intended improvements to the Property, including without limitation, approval of a final plat, conformance with the comprehensive plan, relocation of the MUSA line to include the Property, zoning approvals and building permits (***"Government Approvals"***). Sellers agree to actively support [D.R. Horton]'s applications.

(Emphasis added.) The phrase "as [D.R. Horton] may deem necessary to proceed" qualifies the "final and unappealable approvals" D.R. Horton is to obtain. This language gives D.R. Horton the discretion to decide whether it requires a particular final and unappealable approval to proceed with its plans for development and, therefore, the right to apply for and obtain any such approval. This language also gives D.R. Horton the discretion to move forward without first having procured any final and unappealable approvals. That D.R. Horton "*may* deem [a given approval] necessary to proceed" indicates that it is not required to do so.

When read as a whole, the terms of the agreement support our conclusion. Paragraph 10 affirmatively grants D.R. Horton the *right* to evaluate various aspects of the sellers' property before exercising its option. For example, paragraph 10(c) grants D.R. Horton the right to determine whether there are any conditions on the sellers' land that would interfere with its development plans, such as the presence of endangered species, hazardous waste, or archaeological artifacts. And paragraph 10(a) gives D.R. Horton the right to evaluate whether the sellers' land is suitable with respect to any attribute D.R. Horton desires. In this context, paragraph 10(b) gives D.R. Horton the right to assess its risk by obtaining the level of certainty it deems necessary to justify investing $16.2 million in property it intends to develop. D.R. Horton not only had the right to ensure that its plans for development would be approved, but based on the agreement's reference to "final and unappealable approvals," D.R. Horton also had the right to ensure that any approval it deemed necessary could not be revoked after the land had been purchased. D.R. Horton had the discretion to determine what approvals were necessary before

exercising its option because it bore the risk if its judgment as to which government approvals were necessary was wrong.[4]

The terms of paragraph 10(b)(2) define the Notice of Government Approval that D.R. Horton must send in order to exercise its option:

> If said Government Approvals are achieved on or before January 31, 2003, or [D.R. Horton] elects to waive such matters, [D.R. Horton] shall send written notice (**"*Notice of Government Approval*"**) to Sellers on or before January 31, 2003. Alternatively, if [D.R. Horton] has not received said Government Approvals on or before January 31, 2003, [D.R. Horton] may extend [D.R. Horton]'s Option by written Notice of [D.R. Horton's] extension of the Option (the ***"Notice of Extension"***) delivered to Sellers on or before January 31, 2003. If [D.R. Horton] fails to send either the Notice of Government Approval or the Notice of Extension on or before January 31, 2003, and such failure continues for a period of ten (10) days after written notice from Sellers, or if [D.R. Horton] gives written notice to Sellers of [D.R. Horton]'s inability to obtain the Government Approvals, then this Agreement shall automatically terminate and Sellers may retain all Option Fees paid by Purchaser as of the date of termination.

Under the plain language of this paragraph, D.R. Horton is obligated to notify the sellers in writing if "said Government Approvals are achieved" or if D.R. Horton "elects to waive such matters." But the Notice of Government Approval can be understood only in light of "said Government Approvals," which are defined in paragraph 10(b)(1). *See* Bryan A. Garner, *A Dictionary of Modern Legal Usage* 778 (2d ed. 1995) (describing "said" as a "pointing word"). By definition, "Government Approvals" are only the

[4] D.R. Horton's right to exercise that discretion also triggers the sellers' obligation to "actively support" D.R. Horton's application for any approval it "may [have] deem[ed] necessary," presumably to reduce the risk of nonapproval.

approvals D.R. Horton deem necessary to proceed. A Notice of Government Approval is either (1) written notice that D.R. Horton has secured "all final and unappealable approvals" that it deems "necessary to proceed"; or (2) written notice that D.R. Horton has not deemed any particular approvals "necessary to proceed." In context, therefore, the phrase "elects to waive such matters" requires D.R. Horton to send a Notice of Government Approval informing the sellers if D.R. Horton forgoes its right to secure government approvals that it could have chosen to deem necessary under paragraph 10(b)(1).[5]

Paragraph 10(b)(2) also establishes the initial deadline for D.R. Horton to send the Notice of Government Approval. The Notice of Government Approval effectively informs the sellers that D.R. Horton is either (1) ready to proceed because it already has obtained the approvals it wanted, or (2) ready to proceed despite the risk that it will never obtain them. If D.R. Horton achieves whatever government approvals it "may deem necessary" on or before January 31, 2003, it must send written notice to the sellers by that date. If it has not and is unwilling to commit to the land purchase without them, D.R. Horton has two alternatives. First, D.R. Horton can walk away from the transaction,

[5] The sellers argue that D.R. Horton was required to receive government approvals because the government approvals were necessary to determine the final purchase price. This argument is without merit. The contract states that the purchase price for the property is $16.2 million. Although the purchase price is "subject to [upward] adjustment . . . [i]n the event the City approves more than 740 residential units," the City's actual approval is a condition precedent to any adjustment. *See Minnwest Bank Cent. v. Flagship Props. LLC*, 689 N.W.2d 295, 299-300 (Minn. App. 2004) (subjecting contractual duty to third-party approval generally makes that approval a condition precedent to performance). Because nothing in the contract obligates D.R. Horton to seek such approval, the purchase price simply is the amount stated, $16.2 million.

losing only the option fees paid up to that point. Or, rather than let the option expire, D.R. Horton can send a Notice of Extension. Under paragraph 10(b)(3), this notice extends D.R. Horton's option until January 26, 2006, in exchange for which the sellers receive an increased purchase price in addition to the annual $75,000 option fees:

> Upon [D.R. Horton's] sending of the Notice of Extension, the Option shall be continued until the date which is five years after the date of this Agreement, and the Phase 1 Closing shall be postponed until such date which is ninety days after Sellers' receipt of the Notice of Government Approvals. [D.R. Horton] shall continue to actively pursue all Government Approvals and shall send the Notice of Government Approvals to Sellers within thirty (30) days after [D.R. Horton] receives the Government Approvals. Furthermore, [D.R. Horton] shall continue to pay the Annual Option Fees to Sellers in accordance with Section 3 herein. Additionally, if the Phase 1 Closing occurs after March 31, 2003, the Purchase Price shall increase by 3% annually, calculated on a daily basis from March 31, 2003 through the date of the Phase 1 Closing. The Purchase Price increase shall, however, be limited by the following rules: (i) if [D.R. Horton] is required to reduce the number of Units that can be constructed on the Property below the number contemplated in the first-approved preliminary plat in order to obtain Government Approvals, then the increase shall be calculated based on the Purchase Price minus $10,000 for every Unit below 740 approved Units, multiplied by the 3% increase rate; and (ii) in no event shall the Purchase Price be less than $16,200,000.

Paragraph 10(b)(3) also requires D.R. Horton to act promptly once it receives the necessary government approvals during the extension period. A Notice of Extension continues the option past January 31, 2003, after which paragraph 10(b)(2) is silent as a deadline for sending the Notice of Government Approval. Paragraph 10(b)(3), however, requires D.R. Horton to "send the Notice of Government Approvals to Sellers within

thirty (30) days after [D.R. Horton] receives the Government Approvals." During the extension period, therefore, if D.R. Horton determines that certain approvals are "necessary to proceed" under paragraph 10(b)(1), it must continue to "actively pursue" them.[6] If D.R. Horton actually receives those approvals, paragraph 10(b)(3) imposes a 30-day deadline for sending the Notice of Government Approval, as defined by paragraph 10(b)(2). But if D.R. Horton has not yet determined what, if any, approvals are necessary to proceed or has not yet received them, D.R. Horton may send the Notice of Government Approval as long as the option is continued under the terms of paragraph 10(b)(3).[7]

The sellers' arguments in support of the district court's interpretation are unpersuasive. Although the sellers suggest that requiring D.R. Horton to obtain government approvals during the extension period is an important safeguard for their rights, the unambiguous language creates a long-term option, exercisable in four stages, with closing for each stage at least one year apart. By exercising its option before obtaining government approvals, D.R. Horton assumes the risk of purchasing land that it might be unable to develop. Similarly, the sellers assumed the risk of delay if D.R.

[6] The sellers argue that the language requiring D.R. Horton to "continue to actively pursue all Government Approvals" during the extension period would be meaningless if D.R. Horton did not need to receive any government approvals. But all of the government approvals D.R. Horton must "actively pursue" are by definition only the approvals it "deem[s] necessary to proceed." Thus, a Notice of Government Approval in which D.R. Horton elects to waive its right to secure any particular government approval is equivalent to D.R. Horton notifying the sellers that it has received all of the Government Approvals it deems necessary to actively pursue.

[7] If D.R. Horton has not determined "by the expiration of the extended option period" whether it is willing to risk committing to a purchase without certain government approvals, paragraph 10(b)(4) provides the parties with a window to renegotiate the deal.

Horton uses the entire extension period to decide whether to proceed, as well as the risk that D.R. Horton might ultimately walk away from the later phases. *See* Restatement (Second) Contracts § 37 cmt. a (1981) (explaining that an "offeree under an option contract can choose not to undertake any contractual duties at all"). If the sellers did not want to assume these risks, it was incumbent on them to structure the transaction differently. *Dyrdal*, 672 N.W.2d at 587 (refusing to imply duty to protect other party from known contractual risk on which contract was silent). Because the language defining government approvals unambiguously gives D.R. Horton complete discretion with regard to what, if any, government approvals it will seek under paragraph 10(b)(1), the district court erred by construing paragraphs 10(b)(2) and 10(b)(3) to preclude D.R. Horton from waiving government approvals after January 31, 2003.

D.R. Horton's first letter, dated January 18, 2006, expressly informed the sellers that D.R. Horton waived government approvals. This was equivalent to informing the sellers that D.R. Horton did not deem any further approval to be necessary to proceed under paragraph 10(b)(1). Under the unambiguous language of the contract, this letter was a sufficient Notice of Government Approval. Accordingly, the district court erred by granting the sellers summary judgment based on D.R. Horton's failure to send a valid Notice of Government Approval.

We decline, however, to hold that the district court erred by denying summary judgment in favor of D.R. Horton. On appeal, the sellers argued that, even if D.R. Horton's Notice of Government Approval were valid, D.R. Horton failed to comply with other notice requirements of the contract. The district court did not address these issues

because it granted the sellers' motion based on an erroneous construction of paragraph 10(b). We will not consider on appeal issues that were not decided by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). We, therefore, reverse the grant of summary judgment in favor of the sellers based on the erroneous interpretation of paragraph 10(b) and direct the district court on remand to determine whether D.R. Horton complied with the remaining terms of the contract when it attempted to exercise its option.

Reversed and remanded.