SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MARTIN A. STEINER,	)	**No. S164928**
	)	
Plaintiff and Appellant,	)	Appeal From
	)	Third District
	)	Court of Appeal
v.	)	No. C054605
	)	
	)	
PAUL THEXTON, as Trustee etc., et al.,	)	
	)	
Defendant and Respondent;	)	
	)	
	)	
SIDDIQUI FAMILY PARTNERSHIP,	)	
	)	
Intervener and Appellant.	)	

SUPREME COURT
FILED
NOV 18 2008
Frederick K. Ohlrich Clerk
Deputy

OPENING BRIEF ON THE MERITS FOR APPELLANTS MARTIN A. STEINER and SIDDIQUI FAMILY PARTNERSHIP

Sacramento County Superior Court Case No. 04AS04230,
Honorable Lloyd A. Phillips, Jr., Judge

KLAUS J. KOLB (SBN 146531)
400 Capitol Mall, 11th Floor
Sacramento, CA 95814
Telephone: (916) 558-6160
Facsimile: (916) 492-0598

Attorney for Appellants
SIDDIQUI FAMILY PARTNERSHIP and
MARTIN A. STEINER

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

STEINER v. THEXTON (S164928)

Full Name of Interested Entity/Person	Party	Non-Party	Nature of Interest
Fareed T. Siddiqui	☐	☒	Partner, Siddiqui Family Partnership ("SFP")
Javed T. Siddiqui	☐	☒	Partner, SFP
Khalid T. Siddiqui	☐	☒	Partner, SFP
Nasreen T. Siddiqui	☐	☒	Partner, SFP
Riaz T. Siddiqui	☐	☒	Partner, SFP
Amna J. Siddiqui	☐	☒	Wife of Javed T. Siddiqui, Co-Surety on undertaking posted by SFP
Deborah A. Chesleigh	☐	☒	Recently added Co-Trustee of FAS Family Living Trust, owner of real property at issue.
	☐	☐	
	☐	☐	
	☐	☐	

Submitted by: **KLAUS JOHN KOLB, Attorney at Law** 10/1/08

Klaus J. Kolb

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ISSUES PRESENTED

(1) A purchaser of real property promises in writing to "move expeditiously" to seek a parcel split and development approvals at buyer's expense, and subsequently performs that promise. Does a cancellation contingency provision in the contract convert the purchaser's promise and actual performance into illusory consideration that invalidates the contract when the seller subsequently attempts to reneg?

(2) Does California law preclude application of promissory estoppel as a substitute for consideration to support an option contract?

INTRODUCTION

This appeal arises from a suit by plaintiff Martin A. Steiner ("Steiner") and plaintiff-in-intervention Siddiqui Family Partnership ("SFP") (collectively "plaintiffs") to enforce a contract to purchase real property from defendant Paul Thexton, Trustee of the FAS Family Trust, ("Thexton" or "defendant"). The subject of the contract was an approximately ten acre portion of a twelve acre parcel owned by Thexton. The major difficulty with the proposed contract was that Thexton could not legally sell a ten acre portion of his property without first obtaining Sacramento County approval for a parcel split and development permits.

It is undisputed that the ten acre portion of Thexton's property would be much more valuable with county approval for a parcel split, than without, and Thexton turned down an offer from another developer for $750,000 for the same parcel because that offer required Thexton to provide the required approvals and permits. Because Thexton did not feel able to pursue the lengthy and expensive approval process, Thexton ultimately agreed to enter into a contract to sell the ten acre portion to Steiner for $500,000, with a condition that Steiner pursue the parcel split and development plans expeditiously and at his own cost, and a contingency that Steiner could abandon the effort with notice to Thexton and delivery of all work performed up to the time of such notice.

It is undisputed that Steiner began expeditious performance of the contract immediately after it was signed, and enlisted the assistance of SFP, through its managing partner, Javed T. Siddiqui, in funding and carrying out the necessary work. It is also undisputed that after more than a year of performance and approximately $60,000 in costs invested in the project – all with Thexton's apparent approval and periodic assistance – and when approval of the project appeared imminent, Thexton suddenly announced that he no longer wanted to sell.

Plaintiffs appeal because the lower courts erred as a matter of law in holding that the contract constituted an option contract, and because both

lower courts erred in refusing to apply the doctrine of promissory estoppel to supply any allegedly missing consideration for the Contract.

APPEALABILITY AND STANDARD OF REVIEW

Plaintiffs appealed from a final judgment of the Sacramento County Superior Court entered on December 5, 2006, after a court trial, in which the court held that plaintiffs' Contract was an unenforceable option contract. The final judgment is appealable pursuant to Code of Civil Procedure ("C.C.P.") §904.1, subd. (a)(1).

The issues presented in this appeal are pure issues of law, that do not involve the resolution of disputed facts. As the Court of Appeal concurred: "The interpretation of the contract, which does not involve conflicting extrinsic evidence, is a question of law subject to de novo review. *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-66."

Defendant Thexton previously argued that:

> Whether the (option) agreement was adequately supported by consideration is primarily a question of fact and is therefore subject to the substantial evidence standard which applies whenever an appealed ruling turns on the trial court's determination of disputed facts issues.

Respondent's Brief at 10. However, defendant never supported that argument by identifying any material facts that are in dispute, and instead devoted the remainder of his Respondent's Brief to arguing the legal effect of the undisputed evidence. The Court of Appeal ultimately avoided

expressly deciding which standard of review was appropriate, and instead concluded that, "even under a de novo standard, there was no adequate consideration in this case." Opinion at 12; 24-27.

As summarized in Eisenberg, et al., *California Practice Guide: Civil Appeals and Writs* (Rutter Group 2006) "Scope And Limits Of Appellate Review" ¶8:3, p. 8-1: "Whether an issue is one of "law" or "fact" is generally a question of whether its resolution turns on the *evidence* or the *application of law* ...." Put another way:

> If ... the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently.

Crocker National Bank v. City & County of San Francisco (1989) 49 Cal.3d 881, 888.

This appeal is all about the application of legal principles to undisputed facts. None of the issues raised involve questions about the credibility of any witness or disputes about whether any item of evidence is true or not; the issues raised are all about the legal significance or effect of undisputed evidence. Since the trial court was not "in a better position to form an accurate interpretation of writings" than the appellate courts, this Court is not bound by the trial court's conclusions. *Los Banos Gravel Co. v. Freeman* (1976) 58 Cal.App. 3d 785, 792; *Topanga & Victory Partners, LLP v. Toghia* (2002) 103 Cal.App.4th 775, 780-81. The appropriate

standard of review for all issues raised in this appeal is therefore de novo.

STATEMENT OF FACTS

Plaintiff Steiner entered into a written "Real Estate Purchase Contract" (the "Contract") with defendant Paul Thexton, as Trustee of the FAS Family Trust ("Thexton" or "Seller"), on September 4, 2003.[1] The Contract calls for Thexton to sell ten acres of a 12.29 acre parcel of real property located at 8585 Chris Lane in Orangevale, Sacramento County, California (the "Property"), for a price of $500,000, contingent on Steiner being able to obtain a parcel split of the ten acres from the 12.29 acres. All parties understood that without a parcel split approved by the county, the 10-acre parcel contemplated by the Contract was not a legal lot, and could not be purchased or sold by anyone. R.T. 49:4-14; 132:28-134:26.

The parties entered into the Contract after approximately one year of on again, off again discussion and negotiation of the terms. Steiner prepared the written contract, but modified it to include terms specifically requested by Thexton. C.T. 2-15; 257-289; R.T. 15:13-29:2; 110:16-115:28.[2] Steiner made clear throughout the negotiations with Thexton that Steiner intended to build his personal residence on one of the lots, and that

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[1] Copies of the Contract (Exhibit 1) and Exhibits 2, 3 and 4 are attached to this Brief, pursuant to California Rule of Court ("CRC") 8.204(d).

[2] "C.T." refers to Clerk's Transcript; "R.T." refers to Reporter's Transcript; relevant pages and lines are designated as "page:line."

Steiner would attempt to develop and sell any other lots that were approved as part of the parcel split. R.T. 45:13-46:25; 134:27-136:9.

The fact that the Contract was contingent on Steiner's ability to obtain the approvals necessary for a parcel split and development was one of the key terms specifically discussed and negotiated by the parties during the the year leading up to execution of the Contract. R.T. 113:14-115:28; 125:8-22. For example, Steiner testified, without contradiction, that Thexton told him he had rejected another offer for $750,000 for the ten acre parcel, because that other offer required Thexton to first obtain the approvals and permits necessary to split off the ten acres and obtain permission to develop it. R.T. 23:19-25:11; 122:1-9.

The Contract expressly records the fact that Steiner and Thexton both recognized that there were significant costs and risks associated with attempting to obtain approval for a parcel split and development rights for the ten acre portion of Thexton's Property. R.T. 20:25-28:1; 31:27-33:2. The Contract provided, in relevant part (bold print added):

> In Orangevale, California, on September 3, 2003, Martin A. Steiner and/or Assignee, hereinafter called "Buyer", offers to pay to FAS Family Trust, Paul Thexton, hereinafter called "Seller", the purchase price of Five Hundred Thousand Dollars ($500,000) for 10 acres of a 12.29 acre property situated in the County of Sacramento, State of California, hereinafter called "Property" (defined in Exhibit A), ...

TERMS OF SALE:

1. Upon Seller's acceptance escrow shall be opened and $1,000 (One Thousand Dollars) shall be deposited by Buyer, applicable toward purchase price.

2. **During the escrow term, Seller shall allow Buyer an investigation period to determine the financial feasibility of obtaining a parcel split for development of the Property. Buyer shall have no direct financial obligation to Seller during this investigation period as Buyer will be expending sums on various professional services needed to reach the financial feasibility determination.** Buyer hereby warrants that all fees shall be paid for said professional services by Buyer and neither the Seller nor the Property will in any way be obligated or indebted for said services.

3. Upon mutual execution of this contract, at Buyer's cost, Buyer shall order a Preliminary Title Report on the subject property and open escrow ....

* * *

15. Time is of the essence of this Contract.

* * *

17. **Buyer hereby agrees to purchase the above-described Property for the price and upon the terms and conditions herein expressed.** ... In the event any litigation or other legal proceedings are instituted to enforce or declare the meaning of any provision of this Contract, the prevailing party shall be entitled to its costs, including reasonable attorneys fees. Buyer and Seller hereby acknowledge receipt of a copy of this Contract.

Under the heading "CONTINGENCIES," the Contract (p. 2) continues with the following provisions:

1. Seller is aware that Buyer plans to subdivide, apply for planning entitlements and develop 10 acres from the existing parcel and agrees to cooperate, as needed, with Buyer as Buyer attempts to obtain the necessary permits and authorizations from the various local jurisdictions.

2. **Buyer, at his sole option and expense, will conduct all necessary investigations, engineering, architectural and economic feasibility studies as outlined earlier in this Contract**.

3. Both Buyer and Seller understand that Buyer could have substantial investment during this development period.

* * *

6. Buyer shall indemnify and hold Seller harmless for any costs associated with Buyer's investigations. **In the event this contract is terminated prior to close of escrow, Buyer shall deliver to Seller the originals or copies of all information, reports, tests, studies and other documentation obtained by Buyer from independent experts and consultants concerning the Property**.

7. It is the intent of Buyer that the time period from execution of this contract until the closing of escrow is the time that will be needed in order to be successful in developing this project. **It is expressly understood that the Buyer may, at its absolute and sole discretion during this period, elect not to continue in this transaction and this purchase contract will become null and void**.

Under the heading "CLOSE OF ESCROW" (p. 3), the Contract required that:

> **Upon successful completion of subdividing the 10 acres from the existing parcel,** Buyer will pay Seller the balance of the purchase price to escrow and close immediately.

> **Buyer will move expeditiously with the parcel split.** It is anticipated it will take one to three years, due to existing governmental requirements.
>
> Buyer will give quarterly reports to Seller as to progress of the parcel split.
>
> If parcel split is not completed by September 1, 2006, this real estate purchase contract will be cancelled.

Steiner testified – again without contradiction – that the requirement to "move expeditiously" was specifically requested by Thexton and was important to Thexton. R.T. 113:14-115:28.

Pursuant to and in reliance upon the terms of the Contract, Steiner began the development process almost immediately after execution of the Contract. R.T. 33:26-37:4; 116:2-117:6. By December 2003, Steiner had obtained a preliminary title report, enlisted the assistance of intervenor Siddiqui Family Partnership ("SFP"), and SFP had provided the assistance of JTS Engineering to prepare a tentative subdivision plan, survey the property and begin the work to obtain the necessary approvals for a parcel split and development. R.T. 52:4-55:24; 61:15-65:22; 198:2-202:18. The Contract specifically contemplated that Steiner could assign all or a portion of his interest in the Contract (see introductory paragraph). Steiner subsequently assigned a portion of his interest to SFP in exchange for SFP's agreement to provide and pay for the engineering and planning work, and to provide the financing for the acquisition price set by the Contract. R.T.

61:15-65:22; 205:3-219:5, Exhibit 12.

As a result of the initial development work by Steiner and SFP, on or about January 8, 2004, Steiner and Thexton entered into the:

> **FIRST ADDENDUM TO THE REAL ESTATE PURCHASE AGREEMENT DATED SEPTEMBER 3, 2003 BETWEEN MARTIN A. STEINER AND/OR ASSIGNEE HERINAFTER [sic] CALLED "BUYER" AND FAS FAMILY TRUST, PAUL THEXTON, HEREINAFTER CALLED "SELLER."**

Plaintiffs' Exhibit 2 (attached); R.T. 34:1-37:10.

The "Addendum" was based on the fact that JTS Engineering had completed the survey of the Property, and Steiner had obtained further express directions from Thexton about where Thexton wanted the boundary between his remainder parcel and the ten plus acres he wanted to sell. Based on this additional information, JTS Engineering was able to develop a preliminary lot configuration, a sketch of which is attached to the Addendum. R.T. 37:17-38:1. The more clearly defined lot configuration meant that the portion of Thexton's Property that Thexton was willing to sell was slightly increased from 10 acres to 10.17 acres, and the sale price was increased accordingly. R.T. 34:18-36:2; 37:17-26. In addition, Thexton negotiated additional consideration, in the form of a promise by Steiner to demolish and remove an old barn and abandoned old residence on Thexton's remaining portion of the Property at no cost to Thexton, and to provide Thexton with a water connection at no charge. R.T. 34:5-37:2;

38:20-39:7; 136:10-138:8; 148:17-149:2.

Following execution of the Addendum, Steiner and SFP continued their work in attempting to obtain approval of a parcel split and development permits. Since the ten-plus acre parcel contemplated by the Contract did not have ready access to a public street or utilities (R.T. 25:12-26:8), a considerable amount of work, meetings and planning were required to obtain a parcel split and development approval. R.T. 43:25-44:15; 52:4-55:21; 118:13-119:9; 133:8-23; 207:1-6; 213:18-214:24. Steiner provided Thexton with frequent updates on the status of development efforts. R.T. 34:5-37:2; 40:26-41:24; 116:1-117:6.

Steiner and SFP testified without contradiction that they spent in excess of $60,000, including their "sweat equity," in pursuing the parcel split and development approval over the course of the next year. R.T. 43:25-44:15; 52:4-55:21. In addition, SFP and its individual partners began actively marketing real property located at 812 K Street in Sacramento so that SFP could raise cash for the purchase price for the Property as soon as Sacramento County approved the parcel split and development plans. R.T. 68:24-69:14; 219:3-225:10. The Contract expressly required Thexton to cooperate in an "IRS-1031 exchange for benefit of Buyer and Seller" (Exhibit 1, p. 3). SFP intended to exchange its share of the proceeds from the sale of the 812 K Street property to fund the purchase price of the

Property. R.T. 193:14-195:5.

On or about May 15, 2004, Thexton signed – in two separate places – a "County of Sacramento Planning Department Application Information Form" that had been prepared by JTS Engineering, which requested the County of Sacramento to approve a parcel map that divided the Thexton property into four parcels plus one remainder parcel. Exhibit 3; R.T. 39:8-40:28.

Three months later, on August 19, 2004, Thexton signed a letter addressed to the County of Sacramento concerning the lack of historical significance of the abandoned residence on the Property, and confirmed his intent to have the old residence razed. Exhibit 4; R.T. 41:25-43:23. Thexton supplied the photo attached to his letter.

More than one year after Steiner and SFP began performing their obligations under the Contract, and less than six weeks after Thexton submitted his most recent letter in support of Steiner's development application – and just as it appeared likely that plaintiffs' development plans would be approved – Thexton suddenly reversed position. R.T. 50:18-52:3; 59:20-61:14; 65:23-67:1. On October 4, 2004, Thexton signed a hand-written note requesting the title company to cancel escrow. Exhibit 5; R.T. 47:18-49:19. It is undisputed that up to this time, Thexton had not provided plaintiffs with any notice of any objections or concerns about the

Contract or the work that Steiner or SFP was performing in reliance on the Contract. Steiner subsequently called Thexton to try to find out what was going on, at which time Thexton informed him that he no longer wanted to sell the Property. R.T. 48:5-49:25. Thexton provided no further explanation for his reversal of position until his answer was filed in this action.

By the time Thexton attempted to cancel, Steiner and SFP had already performed somewhere between 75% and 90% of the work required to obtain the approvals necessary to close escrow on the Contract. Steiner and SFP completed the remaining work shortly after Thexton submitted his note attempting to cancel escrow. R.T. 50:18-52:3; 59:20-61:14; 240:26-241:3; 248:25-250:26. Siddiqui and Steiner both testified that the reports, investigations, and preliminary approvals obtained by plaintiffs had substantial value to Thexton, because Thexton would be able to use those documents to continue with a parcel split and development of the Property. R.T. 118:13-119:9; 122:15-134:26; 146:14-147:23.

RELEVANT PROCEDURAL HISTORY

After unsuccessfully attempting to persuade Thexton to perform the Contract, on October 20, 2004, Steiner filed this action for specific performance to prevent Thexton from selling the Property to a third party. R.T. 48:5-49:14; C.T. 2-15. Thexton responded with an answer raising

twenty-three affirmative defenses. C.T. 19-25; 291-296. After further efforts by Steiner and SFP to persuade Thexton to perform at least part of the Contract so that SFP could preserve its 1031 exchange opportunities, SFP sought and obtained leave to intervene, and filed its complaint-in-intervention, seeking specific performance, and damages for the additional taxes SFP was required to pay when the 1031 exchange fell through. C.T. 257-289. SFP subsequently amended its complaint to drop its claim for damages, substituting a request for reformation of the Contract so that a portion of the Contract price would be deferred to give SFP additional time to raise the money that it was forced to take out of escrow to pay taxes due from the failed 1031 exchange. R.T. 291:24-293:8; 294:6-19; R.T. 461:21-462:26.

A court trial on Steiner's and SFP's complaints began on August 7, 2006. R.T. 1, C.T. 320.1. Thexton presented evidence on a number of his affirmative defenses, focusing primarily on his claim that he was a chronic alcoholic who allegedly lacked the mental capacity to enter into the Contract or to recognize plaintiffs' efforts to perform until Thexton suddenly quit drinking the week he signed his note attempting to cancel escrow. See, e.g., C.T. 308:20-27; R.T. 4:6-11:6. Steiner and SFP presented substantial evidence that Thexton's defenses, including his alleged lack of mental capacity, were made up after-the-fact, and that

Thexton's allegations in support of these defenses were inconsistent with his prior actions and prior deposition testimony. R.T. 371:27-376:20.

The Court of Appeal found much of the evidence presented at trial irrelevant to its decision (Opinion at 2, fn. 1). However, given the Court of Appeal's conclusion that the equities did not support applying the doctrine of promissory estoppel in this case, at least an abbreviated summary of the key evidence presented at trial is necessary to provide context for the legal issues presented below.

As plaintiffs argued below (Appellants' Opening Brief at 14-22) and at trial, Thexton's deposition testimony confirmed that he had actually read and understood the terms of the Contract and that he recalled the negotiations leading up to the Contract. Thus Thexton testified that he recalled Steiner approaching him about selling his property, and that Thexton's initial response was: "At the time, no." R.T. 419:7-15. Thexton then testified about his further discussions with Steiner:

Q: "Were there further discussions with Mr. Steiner?"

A: "Yes."

Q: "What were those. What was the general gist of those conversations?"

A: "Well, to make a long story short we just kind of cut to it and I said make a proposal and we will think about it because that's what we have, a proposal."

R.T. 419:16-24. At his deposition, Thexton also testified that he

remembered signing the Addendum and that his "recollection is that we signed it on the rear gate of Mr. Steiner's Tahoe vehicle, on the rear." R.T. 424:6-427:15, particularly 426:21-28. Thexton went on to testify about further details of his conversations with Steiner:

> When I talked to Mr. Steiner about this originally, he only wanted to build two homes, one for himself and one for his brother and I made it quite clear that if we had signed this contract, there were several things that would stay included in what was left for myself, including a well. And also there was another issue there, a right of way issue.

R.T. 443:14-22.

At trial, Thexton claimed that he could not remember any of his past conversations with Steiner and that he could not remember signing the Contract, Addendum, or any of the other contractual documents that bore his signature. See, e.g., R.T. 371:27-376:20.

Notably, Thexton never denied any of Steiner's testimony about the Contract negotiations. Instead, Thexton expressly conceded that all of Steiner's testimony could have been true:

> Q: – – and you have also heard Mr. Steiner discussing in, some detail on multiple occasions all of those conversations – –
>
> A: Oh, yes.
>
> Q: – – so as you sit here as you have today and having testified that you don't remember conversations which you had with Mr. Steiner, you are not necessarily – – they did not exist or did not happen.

A: No. Absolutely, he could be telling the truth. I don't know.

Q: You just don't have a recollection of a lot of what he testified to?

A: Yeah, I am trying to, yeah, tell the truth. To my best recollection, I am sure that's what Mr. Steiner did.

* * *

Q: So when you were deposed a year or so ago, did you attempt to answer every question to the best of your ability?

A: Yes, that's what I stated.

Q: And were you also answering questions based upon knowledge that had come to you through your conversations with Michele [James]?

A: Yes, a lot of them had.

R.T. 446:10-447:20; see also R.T. 409:6-412:6.

Thexton's sworn deposition testimony is inconsistent with his later claim that he lacked any personal knowledge and was just repeating what others told him. Moreover, no other witness testified to the facts that Thexton now claims he learned from listening to other witnesses. For example, Michele James testified that there were no further discussions between Steiner and Thexton about potential terms and conditions of a purchase agreement and that James and Thexton had always made it clear that they had no intention of selling any portion of the Property. R.T. 541:10-542:4. No other witness testified to the fact that Thexton signed

the Addendum on the back of Steiner's Tahoe, so Thexton could not possibly have gained his "recollection" of that fact by repeating what others had told him.

The trial court ultimately accepted defendant's invitation to ignore all of the credibility issues, and accepted defendant's first affirmative defense – that the Contract was a disguised option and void for lack of consideration – and therefore ruled that it need not reach any of the other affirmative defenses defendant offered at trial. Over plaintiffs' objections, the trial court adopted defendant's proposed Statement of Decision ("SOD," C.T. 626-630), holding that the "contract is unenforceable against Defendant Paul Thexton because it is, in effect, an option that is not supported by consideration" C.T. 627:4-6 (SOD at 2:4-6). More particularly, the trial court ruled that the Contract was unenforceable because:

(1) "[t]here was no evidence that any money was paid directly to defendant for his grant of the option to purchase the property, or that defendant received any other benefit or thing of value in exchange for the option" (SOD at 2:21-23; C.T. 607:21-23); and

(2) "even if his [plaintiffs'] actions following execution of the contract could give rise to a claim for promissory estoppel, these actions are not tied to the consideration necessary for the option itself. Plaintiff retained his ability to walk away from the contract at any time and therefore the elements of the doctrine are not satisfied." (SOD 4:6-12; C.T. 609:6-12.)

Steiner and SFP timely appealed. C.T. 722.

The Court of Appeal affirmed most of the trial court's decision, and held that "the agreement was not a contract of purchase and sale, but was rather an unsuccessful attempt to create an option, which in any event was never exercised by plaintiffs." Opinion at 15-16. The Court of Appeal based its conclusion on its finding that:

> [T]he "contract" also provided that Steiner was not obligated to do anything and could abandon the effort with notice to Thexton and delivery to Thexton of any work performed up to the time of such notice.

Opinion at 3. The Court of Appeal held that Steiner's promise to move forward expeditiously and to pay all the costs of plaintiffs' investigations and applications for county approvals was illusory because of the cancellation clause in the Contract. Opinion at 15, 19-20.

> Here, the provisions did not impose binding legal obligations on Steiner, because of the clause allowing Steiner to back out of the deal without doing anything at all.

Opinion at 20.

The Court of Appeal then went on to reject plaintiffs' argument that any missing consideration was supplied by application of the doctrine of promissory estoppel. The Court of Appeal declined to rely on the trial court's rationale that promissory estoppel was not properly pled because plaintiffs did not amend their complaint to expressly allege promissory estoppel in response to defendants' 23 affirmative defenses. Opinion at 23.

Instead, the Court of Appeal quoted *C&K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 6, to note that: "Promissory estoppel is a peculiarly equitable doctrine designed to deal with situations which in total impact, necessarily call into play discretionary powers ...." [Internal quotation marks omitted.] The Court of Appeal went on to conclude:

> As the trial court observed in denying promissory estoppel, Steiner retained the ability to walk away from the agreement at any time. Steiner gave himself this power in the agreement, which he drafted. There is no injustice in a resolution of this case that effectively accords the reciprocal right to Thexton.

Opinion at 24.

The Court of Appeal also supported its conclusion by referring to other evidence such as the fact that the Property had been in Thexton's family since 1944, Thexton's claim that he planned to continue to reside on the Property, and the undisputed facts that Steiner "initiated the idea of this agreement" and that Steiner drafted the Contract, although the Court of Appeal also noted that "Thexton later asked for changes, to which Steiner agreed, regarding matters such as an easement and mineral rights." Opinion at 25-26.

ARGUMENT

The trial court and the Court of Appeal erred as a matter of law in adopting defendant's arguments that the Contract was a disguised option contract, and that the Contract – whether or not it is characterized as an

option – was not supported by sufficient consideration. The undisputed facts presented at trial demonstrate that all parties intended the Contract to be an executory bilateral contract when it was executed by the parties, that plaintiffs provided sufficient consideration at the time the Contract was executed, and that any missing consideration was provided by the doctrine of promissory estoppel and defendant's acceptance of plaintiffs' performance for more than one year before defendant changed his mind and attempted to reneg.

A. The Contract Is A Valid, Enforceable Bilateral Contract, Supported By Sufficient Consideration.

The Contract entered into between Steiner and Thexton was an objectively reasonable attempt by both parties to allocate the cost and risk of pursuing the steps necessary to determine whether approximately 10 acres of Thexton's 12.29 acre Property could be split from the remainder and developed into one or more lots.

It was undisputed at trial that without a parcel split, it would be impossible for Thexton to sell ten of his 12.29 acres to anyone. R.T. 77:9-80:4; 122:2-23. Steiner testified that neither he nor Thexton knew for sure whether Sacramento County would approve a parcel split, whether the County Planning Department would approve plans for developing more than one lot from the ten acres, and what, if any, access would be approved for the ten acre portion of the Property. R.T. 73:1-80:11. Both Mr.

Siddiqui (an experienced civil engineer) and the expert realtor retained by defendant (Mr. Byerrum) testified that the outcome of the approval process was uncertain, and that the County had discretion to deny all or any part of what plaintiffs were seeking. R.T. 73:1-80:4; 206:26-208:12; 589:19-592:15.

The Contract put the burden and risk on Steiner to expeditiously investigate and obtain the permits and approvals necessary, with quarterly updates to Thexton, in exchange for a promise that, if successful, Steiner would be able to purchase the ten acres for a fixed price. R.T. 118:13-119:9; 125:8-22. These provisions of the Contract were the subject of repeated discussions and negotiations between Steiner and Thexton. R.T. 113:14-115:28. Thus Thexton rejected an offer for a substantially higher price because he was unable or unwilling to take on the burden and risk of obtaining the required approvals on his own. R.T. 23:19-25:11; 122:1-9.

All parties recognized that the expense of pursuing the necessary permits and approvals could be substantial and would take some time. The second paragraph of the Contract summarized the parties' agreement that:

> During the escrow term, Seller shall allow Buyer an investigation period to determine the financial feasibility of obtaining a parcel split for development of the Property. Buyer shall have no direct financial obligation to Seller during this investigation period as Buyer will be expending sums on various professional services needed to reach the financial feasibility determination. ...

Contract (Exhibit 1), p. 1, "TERMS OF SALE," para. 2.

The Contract went on to expressly recognize that "Buyer could have substantial investment during this development period," and:

> Buyer will move expeditiously with the parcel split. It is anticipated it will take one to three years, due to existing governmental requirements.

Exhibit 1, p. 2, "CONTINGENCIES," para. 3; p. 3 "CLOSE OF ESCROW," para. 2. Steiner and Siddiqui testified that the cost of preparing the survey, tentative maps, participating in reviews and hearings, and obtaining the tentative approvals was somewhere in the neighborhood of $60,000, and that the market value of providing those services was approximately $80,000 to $100,000. R.T. 43:25-44:15; 52:4-55:21; 118:13-119:9; 133:8-23; 207:1-6; 213:18-214:24.

The consideration to Steiner and his assignee, SFP, for entering into the Contract was that they could purchase 10 acres of defendant's 12 acre parcel for $500,000 if they were successful in obtaining the required permits and approvals. In exchange for this consideration, Steiner and SFP agreed to take on the cost and risk of seeking the development approvals, subject to an "escape clause" that allowed them to discontinue performance at Steiner's discretion. The obvious reason for the escape clause was that no one knew how expensive or time-consuming the efforts to obtain the required approvals would be, and the Contract limited the time allowed to

obtain the required approvals to no more than three years.

The Contract also provided benefits to Thexton, by allowing Thexton to conditionally sell a portion of his property for half a million dollars, and by requiring Steiner to indemnify and hold harmless Thexton from all risks and expenses of the development process, by requiring Steiner to pursue the development process "expeditiously," with quarterly updates to Thexton, and by providing an absolute time limit for Steiner to obtain the required permits and approvals. If plaintiffs were unable to obtain the necessary permits and approvals by September 1, 2006, "this real estate purchase contract will be cancelled" – regardless of how much time, effort and money plaintiffs had invested up to that time.

Further, in the event Steiner determined he was unable or unwilling to continue to pursue the required permits and approvals, the Contract required Steiner to turn over the results of his efforts to Thexton. Steiner and Siddiqui both testified that any reports, investigations, and preliminary approvals obtained by plaintiffs had substantial value to Thexton, because if plaintiffs chose to discontinue their performance of the Contract, Thexton would still be able to use any progress they had made to continue with a parcel split and development of the Property. R.T. 118:13-119:9; 122:15-134:26; 146:14-147:23. Had Steiner run into a roadblock that prevented development or made development prohibitively expensive, even that

knowledge would have had value to Thexton, because he could then have made alternate plans about what to do with all or part of his Property.

There should be no question that the Contract, when viewed in its entirety, was an objectively reasonable and fair way for two parties to allocate the costs and risks of achieving the shared goal of investigating and achieving a sale of ten of Thexton's 12 plus acres. Defendant conceded as much in his Respondent's Brief to the Court of Appeal (at 9):

> Respondent has never asserted that these [$500,000 purchase price and $1,000 deposit], along with other provisions contained in the written document, constituted inadequate consideration ***for the sale of the Property*** (assuming that the option were exercised and the sale consummated). [Emphasis in original.]

However, the trial court and the Court of Appeal refused to view the transaction in its entirety, and instead artificially divided it into two parts: (1) an offer by Thexton to sell ten acres for $500,000; and (2) an option held by Steiner to accept the offer for up to three years, which option was supposedly unsupported by separate consideration. Only by artificially dividing the transaction into two separate portions could the trial court and the Court of Appeal conclude that there was insufficient consideration to sustain the transaction or to enforce the obvious mutual intention of the parties at the time they entered into the Contract.

1. **The cancellation clause should not be interpreted as converting the Contract into an option.**

Both defendant and the lower courts base their contention that the Contract was a disguised option on their view that the Contract did not *require* Steiner to conduct the investigations and incur the "substantial investment" referred to in the Contract, because it also provides (at p. 2, "CONTINGENCIES," para. 7, italics added) that:

> It is the intent of Buyer that the time period from execution of this contract until the closing of escrow is the time that will be needed in order to be successful in developing this project. *It is expressly understood that the Buyer may, at its absolute and sole discretion during this period, elect not to continue in this transaction and this purchase contract will become null and void.*

Defendant argues that this language converts the Contract into an option, and that there is insufficient consideration for an option that requires Thexton to leave his land off the market for three years.

It is first worth noting that neither party ever referred to the Contract as an "option" until after: (1) Steiner and SFP had performed most of their obligations, (2) Thexton reversed positions and attempted to reneg, and (3) Thexton then attempted to defend his change of heart with 23 affirmative defenses to Steiner's suit for specific performance. There is absolutely no evidence that any party intended the Contract to be an option, or intended to allow Thexton to opt out of the Contract during the time that Steiner and SFP were actively attempting to perform. For example, nothing in the

Contract suggests that Thexton reserved the right to revoke, withdraw, or terminate his promise to sell the Property to Steiner and/or his Assignee for $500,000 during the time that Steiner was attempting to perform the Contract.

Furthermore, nothing in the Contract required Thexton to keep his Property off the market for any defined period of time. The Contract specifies a drop dead date of September 1, 2006 ***for Buyer*** **to obtain the necessary approvals,** ***or Buyer forfeits rights*** he would otherwise have to obtain the Property for the Contract price. The Contract does ***not*** require ***the Seller*** – Thexton – to keep the Property off the market for three years, regardless of whether or not Steiner "expeditiously" pursued the parcel split.

Because the Contract does not provide for a fixed time during which plaintiffs need do nothing but contemplate an offer, the Contract does not meet the definition of an option. Thus, the Court of Appeal explained:

> An option to purchase property is "a unilateral agreement. The ***optioner offers to sell the subject property at a specified price or upon specified terms and agrees, in view of the payment received, that he will hold the offer open for the fixed time***. Upon the lapse of that time the matter is completely ended and the offer is withdrawn. If the offer be accepted upon the terms and in the time specified, then a bilateral contract arises which may become the subject of a suit to compel specific performance, if performance by either party thereafter be refused." (*Auslen v. Johnson* (1953) 118 Cal.App.2d 319, 321-322.)

Opinion at 13-14 (footnote omitted, emphasis added). The Contract only required Thexton to keep the Property off the market during the time that plaintiffs were "expeditiously" moving forward with work required to accomplish the purpose of the Contract – approval of the parcel split that was required before Thexton could legally sell any portion of the Property to anyone. R.T. 260:7-20.

Defendant and the lower courts respond to this point by arguing that:

> However, despite plaintiffs' assertion that Thexton could have sued them if they failed to act expeditiously, the promise to act "expeditiously" was an unenforceable promise, since the agreement did not require plaintiffs to move forward at all. The same applies to Steiner's promise to pay for the investigations and applications for county approvals. This was an unenforceable promise because he had to pay only if he went forward seeking the county approvals. The agreement did not require him to move forward.

Opinion at 15.

To reach their conclusion, the lower courts and defendant interpreted the Contract in a way that is contrary to established principles of contract interpretation, and they disregarded undisputed facts and the unmistakable intentions of the parties at the time they entered into the Contract.

2. The implied covenant of good faith and fair dealing defines any ambiguity in a contract in a way that gives effect to the expressed mutual intention of the parties.

California law has long held that the primary focus of contract interpretation is to give effect to the expressed intentions of the parties at

the time they entered into a contract. For example:

> A contract must be interpreted to give effect to the mutual, expressed intention of the parties. Where the parties have reduced their agreement to writing, their mutual intention is to be determined, whenever possible, from the language of the writing alone.

Beard v. Goodrich (2003) 110 Cal.App.4th 1031, 1038 [citations omitted].

Further:

> [T]he words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.

Civil Code §1644; 1 Witkin *Summary of California Law* (10th ed. 2005) "Contracts" §745, p. 833. As summarized in *Witkin, supra*, §746, p. 834:

> "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (C.C. 1641.) "[W]here there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." (C.C.P. 1858.) [Citations omitted.]

See also *City of Shasta Lake v. County of Shasta* (3rd Dist. 1999) 75 Cal.App.4th 1, 10-11, interpreting an agreement to arbitrate as a stipulation for trial by a temporary judge, because "the law aspires to respect substance over formalism and nomenclature. (See, e.g., Civ. Code, §3528; [other citations, footnote omitted]."

The parties' "mutual expressed intention" in this case is perfectly clear from the plain language of the Contract – to put the burden on Steiner

to attempt to obtain a parcel split without any cost or risk to defendant, in exchange for a fixed purchase price if Steiner was successful, and with an escape clause for Steiner if the task became too expensive or he was otherwise unable to proceed.

The obvious interpretation of the parties' mutual intent is also confirmed by the parties' conduct *after* they entered into the Contract. As *Witkin, supra*, §749, p. 838, summarizes:

> Acts of the parties, subsequent to the execution of the contract and before any controversy has arisen as to its effect, may be looked to in determining the meaning. The conduct of the parties may be, in effect, a *practical construction* thereof, for they are probably least likely to be mistaken as to the intent. "This rule of practical construction is predicated on the common sense concept that 'actions speak louder than words.' Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent." (*Crestview Cemetary Assn. v. Dieden* (1960) 54 C.2d 744, 754, ... [Italics in original.]

Nothing in the conduct of the parties or in the language of the Contract suggests that either party intended to create an option, requiring Thexton to hold the Property available for three years while Steiner decided whether he wanted to accept the offer to sell. To the contrary, the Contract reflects the undisputed fact that Steiner and Thexton agreed on terms for the purchase of the Property, but the terms were contingent on obtaining required approvals and permits from the county. The deal struck between

Steiner and Thexton required Steiner to "expeditiously" invest the time and effort to pursue the required permits and approvals and to indemnify Thexton from any cost or risk associated with that effort, so both Steiner and Thexton could determine whether the contemplated sale was possible.

a. The entirety of the Contract provides a context that limits Buyer's discretion to "elect not to continue" with the expense of seeking a parcel split or development approval.

Defendant and the lower courts argue that all of plaintiffs' obligations are illusory because plaintiffs had no obligation to even commence performance. Opinion at 20. This requires an interpretation of the Contract that is contrary to the plain language and obvious intention of the parties when they entered into the Contract.

Buyers' obligations to "move expeditiously with the parcel split" and to indemnify Seller (Thexton) from any cost or loss were, by their terms, effective immediately. Steiner testified that he understood his obligation to "move right away," "to move forward with the engineering" for the project after Thexton executed the Contract. R.T. 113:26-28; 114:27-116:10.

The "TERMS OF SALE" section of the Contract reflects the parties' agreement that Buyer would have "an investigation period to determine the financial feasibility of obtaining a parcel split for development of the Property," and recognizes that this investigation period will require Buyer to incur significant expenses. The "CLOSE OF ESCROW" section requires

that "Buyer will move expeditiously with the parcel split." The "CONTINGENCIES" section of the Contract expressly records Buyer's commitment to incur all expenses to seek the necessary approvals, to indemnify and hold Seller harmless from all these expenses, and confirms that this process could require a "substantial investment" by Buyer. Exhibit 1, p. 1, para. 2; p. 2, paras. 1-7; p. 3, para. 2.

It is in this context of unknown but expected substantial investment that Buyer reserved the right, in the "***CONTINGENCIES***" section of the Contract, "at its absolute and sole discretion during this period, [to] elect not to continue in this transaction ...." Exhibit 1, p. 2, paras. 1-7. Further, the parties expressly anticipated and provided for the possibility that Buyer may have to discontinue performance. Thus the Contract required that:

> ... In the event that this contract is terminated prior to the close of escrow, Buyer shall deliver to Seller the originals or copies of all information, reports, tests, studies and other documentation obtained by Buyer from independent experts and consultants concerning the Property.

Contract, p. 2, "CONTINGENCIES," para. 6. The fact that the Contract spelled out Buyer's obligation to turn over all documentation if the Contract is terminated before close of escrow further confirms that the Contract required Buyer to "move expeditiously with the parcel split," even though it also allowed Buyer to ***subsequently*** "elect not to continue in this transaction." Exhibit 1, p. 3, para. 2; p. 2, para.6.

Defendant and the lower courts interpreted the Contract as giving Buyer the right to terminate performance immediately upon signing the Contract. However, no witness testified to such an interpretation, and such an interpretation is inconsistent with the obvious purpose and plain language of the Contract taken as a whole. Defendant's and the lower courts' interpretation requires the assumption that Buyers would try to defeat Thexton's right to receive benefits under the Contract instantly upon execution of the Contract. The undisputed evidence of plaintiffs' actual performance proves the opposite. R.T. 118:13-132:11; 258:22-260:20.

b. The implied covenant of good faith and fair dealing limits an apparent grant of absolute discretion when such a limitation is consistent with the mutual intention of the parties at the time of contracting.

Defendants' and the lower court's interpretation of the Contract as allowing for the immediate, discretionary termination of all performance by Buyers is not only contrary to the obvious intention of the parties; it is also contrary to long-established rules of contract interpretation.

In *Bleecher v. Conte* (1981) 29 Cal.3d 345, 351, this Court held that a real estate contract which made the buyers' obligation to pay contingent on their approval of various documents and reports was not illusory because the buyers had agreed to "proceed with diligence" and to "do everything in their power to expedite the recordation of the final map ...." This Court pointed to "two other well-established rules" that the Court considered

pertinent to deciding whether a party's promises were illusory:

> First, "[i]n every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement. [Citations.]" ... Second, if a contract is capable of two constructions, the court must choose that interpretation which will make the contract legally binding if it can be so construed without violating the intention of the parties.

Bleecher v. Conte, supra, 29 Cal.3d at 350.

In *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 372, this Court cited with approval a commentator's suggested definition of what is required by the covenant of good faith:

> In the case of a discretionary power, it has been suggested the covenant requires the party holding such power to exercise it "for any purpose within the reasonable contemplation of the parties at the time of formation – to capture opportunities that were preserved upon entering the contract, interpreted objectively." (Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith* (1980) 94 Harv.L.Rev. 369, 373, fn. omitted.) [Footnote omitted.]

Several Courts of Appeal have interpreted this Court's holdings in *Bleecher* and *Carma*, as establishing the rule:

> [W]hen a party is given absolute discretion by express contract language, the courts will imply a covenant of good faith and fair dealing to limit that discretion in order to create a binding contract and avoid a finding that the promise is illusory.

Storek & Storek, Inc. v. Citicorp Real Estate, Inc. (1st Dist. 2002) 100

Cal.App.4th 44, 57, citing *Third Story Music, Inc. v. Waits* (2nd Dist. 1995) 41 Cal.App.4th 798, 808.

The rule expressed in *Carma*, *Storek & Storek, Inc.*, and *Third Story Music, Inc.*, is perfectly consistent with California's other long-established rules of contract interpretation, in that it applies the implied covenant of good faith and fair dealing to define or limit apparent discretion "in order to create a binding contract and avoid a finding that the promise is illusory." *Storek v. Storek, Inc., supra*, 100 Cal.App.4th at 57.

The leading commentators on contract law agree. Thus in *Third Story Music, supra,* 41 Cal.App.4th at 805-806, the Court observed:

> As was said in the most recent edition of Corbin's treatise on contracts: "The complaint that a promise is illusory often comes in rather poor grace from the addressee of the allegedly illusory promise, particularly where the addressor is ready and willing to carry out the expression of intention. For this reason, courts are quite properly prone to examine the context to conclude that the escape hatch was intended to be taken only 'in good faith' or in the 'exercise of a reasonable discretion' or upon some other condition not wholly within the control of the promisor. In which case, the conclusion is that the promise is not illusory." (1 Corbin, Contracts, [(rev. ed. 1995)] §1.17 at p. 49.) "The tendency of the law is to avoid the finding that no contract arose due to an illusory promise when it appears that the parties intended a contract. . . . An implied obligation to use good faith is enough to avoid the finding of an illusory promise." (2 Corbin, Contracts, *supra*, §5.28 at pp. 149-150.)

The federal Ninth Circuit Court Of Appeals apparently reached the same understanding of California law in *Fosson v. Palace (Waterland), Ltd.* (1996) 78 F.3d 1448, 1454. In *Fosson*, the Ninth Circuit cited *Bleecher* to

uphold the validity of a contract that required defendants to pay plaintiff a fixed amount if, and only if, they chose to use a musical composition in a movie they were producing. As the Ninth Circuit explained *(id.* at 1454):

> [A]lthough use of the Composition was within the Producer's discretion and control, we hold that a valid contract arose by virtue of the obligations the Producers agreed to assume in the event the Composition was used. Further, the Producers were under an implied obligation to act fairly to protect Fosson's rights and benefits under the contract.

In this case, the Contract also gives Buyers "discretion and control" over whether they would ultimately have to pay the agreed-upon purchase price to the Seller. However, in addition to the implied covenant of good faith and fair dealing, this Contract expressly requires the Buyer to proceed expeditiously with the research and engineering required to accomplish the Contract's objective; it requires Buyer to provide Thexton with quarterly updates on plaintiffs' progress; and it requires Buyer to provide Thexton with "the originals or copies of all information, reports, tests, studies and other documentation obtained by Buyer from independent experts and consultants concerning the Property." Further, the Contract expressly defines the purpose of the delay between Contract signing and closing:

> It is the intent of Buyer that the time period from execution of this contract until the closing of escrow is the time that will be needed in order to be successful in developing this project.

Exhibit 1, p. 2, para. 7.

This Contract therefore provides more consideration that what was

considered sufficient in *Fosson.* As in the *Fosson* and *Bleecher* cases, plaintiffs had an enforceable obligation to either proceed diligently, or to advise defendant Thexton that they could or would not proceed. The Contract was therefore based on mutual promises, that were mutually binding on the parties.

The holdings in *Bleecher, Storek & Storek, Inc.*, and *Third Story Music, Inc.,* instruct that courts should not assume unlikely and bad faith actions by parties to a contract as a reason to invalidate the contract. Instead of applying the implied duty of good faith to save the mutual intention of the parties, the lower courts assumed bad faith by plaintiffs – despite the fact that plaintiffs' actual conduct proved the opposite.

c. <u>In the event of ambiguity, California law presumes a contract to be bilateral, rather than an option</u>.

If doubt remains, California law generally presumes that a contract is bilateral, rather than unilateral.

> If doubt [exists] as to whether the agreement was bilateral or unilateral, such doubt would have to be resolved by interpreting the agreement to be bilateral. ... There is a presumption in favor of interpreting ambiguous agreements to be bilateral rather than unilateral.

Patty v. Berryman, (1949) 95 Cal.App.2d 159.

In this case, there is no evidence that the parties intended the Contract to be a unilateral option rather than a bilateral contract, and the mutual intentions of the parties at the time they entered into the Contract

can best be given effect by interpreting the Contract to be bilateral, rather than unilateral. It is therefore contrary to all of the principles of contract interpretation to strain to interpret this Contract to be an unenforceable option instead of an enforceable bilateral contract.

No party produced any evidence to suggest that either party intended the Contract to be construed in a way that prevented Thexton from suing for breach of contract if Steiner did not expeditiously pursue the parcel split. Similarly, nothing in the Contract or California law would have prevented Thexton from selling the Property to someone else if Buyer "elect[s] not to continue in this transaction" at any time before September 1, 2006, or if Buyer had materially breached the Contract, i.e., by not moving expeditiously with the parcel split. Contract p.2, "CONTINGENCIES," para. 7; p. 3, "CLOSE OF ESCROW," para. 2.

3. Buyers' partial performance made up for any other defects in consideration, and made the Contract enforceable.

Defendant's arguments and the lower courts' decisions disregard the undisputed partial performance of the Contract by Steiner and SFP as of the time Thexton attempted to reneg. The holdings of *Bleecher, supra; Storek & Storek, Inc., supra*, and *Third Story Music, Inc., supra,* are also consistent with the well-established rule that partial performance should be used to enforce a contract if a promise might otherwise be considered illusory. As explained in *Burgermeister Brewing Corp. v. Bowman* (1964) 227

Cal.App.2d 274, 280:

> "In every case of this kind, however, the agreement should be scrutinized carefully to see whether the promisor *did not give some consideration that was not affected by his power to cancel*, and also whether there has not been a part performance that makes up for the defects of the consideration."

Id., quoting 1A Corbin on Contracts, §163, p.76 [italics added by *Burgermeister* court]; accord *The Money Store Investment Corporation v. Southern California Bank* (4th Dist. 2002) 98 Cal.App.4th 722, 728 ("An agreement that is otherwise illusory may be enforced where the promisor has rendered at least part performance. [Citations omitted.]").

Once again, established California precedent supports a rule that attempts to salvage the parties' mutual intent as of the time of contracting, rather than a rule that allows a court to determine after-the-fact whether it would be more equitable to allow a party to avoid its promise than to honor it.

As of January 8, 2004, when defendant ratified the Contract by executing the Addendum, Steiner and SFP had already demonstrated that they were expeditiously investigating the parcel split and had already prepared a preliminary lot configuration. Thus as of the date Thexton signed the Addendum, Steiner and SFP had already "suffered prejudice," and had already conferred a benefit on Thexton, in the form of obtaining a preliminary title report, and producing a survey and preliminary lot

configuration. Furthermore, pursuant to the Contract (p. 2, para. 6), plaintiffs were under a binding legal obligation to provide the results of the survey and all work that went into the preliminary lot configuration to Thexton, *even if plaintiffs hypothetically decided to withdraw immediately after Thexton executed the Addendum.*

4. No public policy reason supports a rule that would forbid parties to a contract from reserving a cancellation right.

There is nothing inherently immoral, illegal, or evil about the way the parties allocated the cost and risk of seeking a parcel split in the Contract. Nothing about the parties' expressed mutual intent is inconsistent with applying the implied covenant of good faith and fair dealing to define the apparent discretion reserved by Steiner, particularly since that discretion was reserved in a Contract provision that expressly recognizes that it might take three years of effort to determine whether a parcel split could be achieved.

Nor is there any apparent public policy reason why parties should not be allowed to include a cancellation contingency provision in their Contract. Neither the lower courts nor defendant have provided any reason to prohibit parties from agreeing that the Seller will hold a property available for sale at an agreed upon price so long as the Buyer is actively spending time and money pursuing development approvals – particularly when the Buyer agrees to provide all the results of its efforts to Seller in the event the Buyer

determines it cannot proceed. As the facts of this case demonstrate, such an agreement makes perfect practical sense when the parties agree to sell a portion of a parcel of property, but neither party knows whether it is legally or practically possible to do so.

In this case, the parties agreed upon a solution that had Buyer assume the cost and risk of obtaining a parcel split, in exchange for a fixed purchase price for the new parcel if the split were legally and practically feasible. There is no legal or public policy reason to find that the deal struck by the parties should be undone. There is no logical or public policy reason to create a legal technicality to trap lay business people who enter into a contract as a means of allocating costs and responsibilities to solve a mutual problem. To the contrary, "investigation periods" that permit a party to withdraw from a contract very likely prevent litigation about whether the Seller made all the disclosures required by California law. See *Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 410:

> "In the context of a real estate transaction, '[i]t is now settled in California that where the seller knows of facts materially affecting the value or desirability of the property ... and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer.'" [Citations omitted.]

B. The Doctrine Of Promissory Estoppel Should Remain Available To Supply Consideration For An Option Contract Or To Enforce A Promise, Even If One Party Reserves The Right To Suspend Further Performance.

Plaintiffs maintain that the total package of consideration promised in the Contract and partially performed by the date defendant reneged is sufficient consideration to enforce the Contract as a bilateral contract. However, the Contract is enforceable against defendant even if the Court accepts defendant's argument that it is nothing but a disguised option.

Defendant's attempt to characterize the Contract as an option is only effective if the Court also concludes that plaintiffs provided no consideration for the alleged option. "Any consideration, however small, has been held sufficient for an option contract." *Kowal v. Day* (1971) 20 Cal.App.3d 720, 726. Or as the Court of Appeal's Opinion notes (at 16-17):

> "An option based on consideration, whether it be the proverbial peppercorn or some other detriment, is itself a binding contract and is mutually enforceable. [Citations.] ..." (*Torlai v. Lee* (1969) 270 Cal.App.2d 854, 858-859.).

The preliminary title report ordered by plaintiffs, the survey and the preliminary lot configuration prepared by plaintiffs – all of which were provided to defendant before he ratified the Contract by signing the Addendum on January 8, 2004 (Exhibit 2) – are indisputably worth more than the proverbial peppercorn. And a valid option contract is also a valid

basis for seeking an order for specific performance. *Kowall v. Day, supra*, 20 Cal.App.3d at 726; Civil Code §3386.

1. <u>The Contract provided for consideration that must be attributable to any alleged option component of the Contract</u>.

California Civil Code §1605 codifies the definition of "consideration" as:

> Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, *or any prejudice suffered, or agreed to be suffered*, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, *is a good consideration for a promise*. [Italics added.]

Defendant's Statement of Decision, adopted by the trial court, incorrectly states that "[t]here was no evidence that ... defendant received any other benefit or thing of value in exchange for the option."

The Contract expressly provides that all of the obligations listed in paragraphs 3 (Preliminary Title Report) and 5 (Buyer to pay for "required civil engineering and surveying for the entire parcel map") under the heading "<u>TERMS OF SALE</u>" (Contract, p. 1), and all of the obligations listed under the heading "<u>CONTINGENCIES</u>" (Contract, p. 2), are to be performed during the period of time "from date of acceptance until the closing of escrow ...." In particular, Buyer's obligations to indemnify and hold harmless the Seller during the investigation period, and Buyer's obligation to provide any documentation obtained or developed during the

investigation period, ("CONTINGENCIES," paras. 4, 6) only have meaning if they are performed before close of escrow.

Paragraph 7 of "CONTINGENCIES" expressly provides that:

> It is the intent of Buyer that the time period from execution of this contract until the closing of escrow is the time that will be needed in order to be successful in developing this project.

The second paragraph under "CLOSE OF ESCROW" (page three) expressly provides: "Buyer will move expeditiously with the parcel split. It is anticipated it will take one to three years due to existing governmental requirements."

The Contract adequately records the parties' intent that the consideration provided in the Contract provisions identified above was to be provided during, and as part of the consideration for, the period of time it would take to determine whether the parcel split could be accomplished. The final purchase price of $500,000 for the Property was to be paid "[u]pon successful completion of subdividing the 10 acres from the existing parcel," so *that* consideration is clearly attributable to the final purchase of the Property, rather than to the period of time during which Seller is obligated to cooperate with Buyer while Buyer attempts to "expeditiously" accomplish the parcel split – i.e., the alleged option period.

To the extent the Court construes the Contract as an option, the only reasonable construction of the Contract is that all the benefits conferred and

prejudice Buyer agreed to assume *before* "successful completion of subdividing the 10 acres from the existing parcel," – and before Buyer was obligated to pay the purchase price – were intended to compensate Seller for the period of time during which Buyer was attempting to accomplish the parcel split. If the Court concludes that the "CONTINGENCIES" of the Contract created an option, these benefits conferred and prejudice assumed were consideration that can only be attributed to that option.

2. The doctrine of promissory estoppel should be applied to supply any consideration otherwise missing from the Contract, even if it is interpreted to be an option contract.

The doctrine of promissory estoppel has been recognized under California law for decades, at least since this Court's decision in *Drennan v. Star Paving Co.* (1958) 51 Cal.2d 409, 413. Over the past 50 years, California courts have applied the doctrine as a form of "substitute consideration" to enforce a wide variety of promises. *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 6; see cases listed in *Witkin, supra*, "Contracts," §244, p. 275-76. Thus, in *Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal. 3d. 665, 672, this Court explained:

> [T]he doctrine of promissory estoppel is used to provide a substitute for the consideration which ordinarily is required to create an enforceable promise. This court has recently pointed out that "The purpose of this doctrine is to make a promise binding, under certain circumstances, without consideration in the usual sense of something bargained for and given in exchange."

The elements of promissory estoppel are typically quoted from section 90 of the Restatement of Contracts:[3]

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

C & K Engineering Contractors v. Amber Steel Co., supra, 23 Cal.3d at 6. As this Court restated in *Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 249, and again in *Raedeke v. Gibraltar Sav. & Loan Assn., supra*, 10 Cal.3d at 672, fn. 1:

> Under this doctrine a promisor is bound when he should reasonably expect a substantial change of position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement.

In this case, defendant not only "reasonably expect[ed] a substantial change of position" by plaintiff Steiner; defendant clearly knew, for a period of twelve months, that Steiner was making a substantial investment in reliance on defendant's promise to sell the Property for the agreed upon price. The Contract records, in at least eight separate paragraphs, the expectation of the parties that Buyer would be expending "substantial" sums during the escrow term to "determine the financial feasibility of

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[3] As the Court of Appeal noted, "[t]he provision remains substantially the same in the Restatement 2d of Contracts, though the phrase 'of a definite and substantial character' has been deleted." Opinion at 24, fn. 7.

obtaining a parcel split for development of the Property," and that "the time period from execution of this contract until the closing of escrow is the time that will be needed in order to be successful in developing this project." Exhibit 1, "TERMS OF SALE," para. 2; "CONTINGENCIES," paras. 1, 2, 3, 4, 6, 7; "CLOSE OF ESCROW," para. 2.

Plaintiffs' performance and detrimental reliance for over one year supplied any necessary consideration that might otherwise be lacking for the Contract. Plaintiffs did exactly what they promised to do, by moving expeditiously to obtain the approvals necessary for a parcel split, and by making a "substantial investment during this development period." Defendant knew that plaintiffs were making that substantial investment, not just because of the Contract language required it; defendant observed and actively participated in plaintiffs' efforts for a period of twelve (12) months before he attempted to cancel escrow. Defendant cooperated with SFP's survey of the Property in December 2003, negotiated and signed the Addendum showing the preliminary lot configuration in January 2004, and assisted in communications with the County in support of the development process all the way through August 2004. Exhibits 2, 3, 4.

Allowing defendant to watch and assist plaintiffs performance until it was virtually completed, and then claim the Contract was unenforceable due to a lack of consideration, would work a forfeiture on plaintiffs and

result in a clear injustice. This case is therefore a perfect example for the doctrine of promissory estoppel to provide any consideration that might otherwise be missing from the Contract, because "injustice can be avoided only by its enforcement."

3. A buyer's right to cancel does not preclude detrimental reliance on the seller's promise to perform.

The Court of Appeal's Opinion appears to accept that all of the requirements for promissory estoppel were met in this case, except that the Court concluded that:

> However, plaintiffs fail to show any injustice in denying enforcement of the agreement. As the trial court observed in denying promissory estoppel, *Steiner retained the ability to walk away from the agreement at any time*. Steiner gave himself this power in the agreement, which he drafted. *There is no injustice in a resolution of this case that effectively accords the reciprocal right to Thexton.*

Opinion at 24 (italics added).

The Court of Appeal's holding bars application of promissory estoppel to enforce an attempted option contract or any other agreement made to a party who reserves a cancellation right, no matter how much that party detrimentally relied, and no matter how much consideration was conferred to the other party after the agreement was executed. Thus the Court of Appeal accepted the fact that appellants spent $60,000 over the course of a year in detrimental reliance on defendant's promise (Opinion at 7, fn.3), and the Court of Appeal assumed that appellants' efforts had

increased the value of defendant's Property (Opinion at 26).

No published California authority and no rationale precludes application of the doctrine of promissory estoppel to option contracts. To the contrary, in *Drennan v. Star Paving Co., supra,* this Court enforced a subcontractor's promise, made without consideration, to perform paving work for a set price. This Court held that the subcontractor should be held to his promise because he "had reason not only to expect plaintiff to rely on its bid but to want him to." *Drennan v. Star Paving Co., supra*, 51 Cal.2d at 415. The fact that the general contractor obviously could not be expected to accept every bid it received was no reason to deny enforcement of the promise on which the general contractor *did* detrimentally rely.

In *Drennan, supra*, 51 Cal.2d at 414, this Court explained the rationale for applying the doctrine of promissory estoppel:

> Whether implied in fact or law, the subsidiary promise serves to preclude the injustice that would result if the offer could be revoked after the offeree had acted in detrimental reliance thereon. Reasonable reliance resulting in a foreseeable prejudicial change in position affords a compelling basis also for implying a subsidiary promise not to revoke an offer for a bilateral contract.

Nothing in the rationale for applying promissory estoppel suggests that a promise should *not* be enforceable just because that promise recognizes, or is based on, the other party's right to terminate further performance under agreed-upon conditions. Nothing in prior California

case law suggests that only reciprocal promises are subject to the doctrine of promissory estoppel. Instead, California law has so far held that whether the doctrine of promissory estoppel is available depends primarily on whether the promisor should reasonably expect to induce detrimental reliance, and on whether the promise actually did induce detrimental reliance. *C & K Engineering Contractors v. Amber Steel Co., supra*; *Drennan v. Star Paving Co., supra*, 51 Cal.2d at 415, 416.

The Court of Appeal's Opinion (at 26-27) attempts to distinguish this case from *Drennan* by noting that "the agreement between the general contractor and the paving company was silent as to revocation," whereas Steiner reserved the right to revoke. However, this Court's decision in *Drennan* was not based on any finding that the *general contractor* did *not* have the right to revoke. Rather, this Court pointed out that the paving subcontractor – *the promisor in that case* – did not reserve the right to revoke, just as Thexton did not reserve the right to revoke in this case. *Drennan, supra*, 51 Cal.2d at 416.

As in *Drennan*, in this case it was in the promisor's – Thexton's – "own interest" to encourage the other party to rely on the promise. *Drennan, supra*, 51 Cal.2d at 415. Pursuant to the Contract, Steiner was performing the development work that Thexton was unable or unwilling to do himself. The Contract expressly records the parties' understanding that:

"Both Buyer and Seller understand that Buyer could have substantial investment during this development period," so it is indisputable that Thexton "should reasonably expect" his promise to induce detrimental reliance by appellants. *C & K Engineering Contractors v. Amber Steel Co., supra*, 23 Cal.3d at 6.

The Court of Appeal's Opinion cites the requirement that promissory estoppel should only be applied "if injustice can be avoided only by enforcement of the promise," and concludes that "the equities do not support compelling Thexton to sell the property." Opinion at 26. However, comment b to the original Restatement §90 provides:

> Satisfaction of the latter may depend on the reasonableness of the promisee's reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise, and on the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant.

Quoted in *Witkin, supra*, "Contracts," §244, p. 275. The comment to the Restatement therefore supports this Court's explanation in *Drennan* that the equities relevant to applying the doctrine of promissory estoppel should focus on the nature of the promise made and the detrimental reliance induced by that promise.

Neither the Restatement nor existing California case law supports the

Court of Appeal's approach of conducting a far-ranging re-examination of the equities of the original promise. An after-the-fact inquiry into the equities of the underlying promise that is *not* based on attempting to give effect to the expressed intentions of the parties is likely to lead to inequitable results, and will inevitably lead to increased litigation. For example, while the Court of Appeal suggests that something about the original agreement between the parties was unfair to defendant, the Opinion does not point to any specific Contract provisions or findings by the trial court that show unfairness.

More importantly, there is no basis for the Court of Appeal to equate appellants' bargained-for right to cancel with defendant's alleged right to breach his promise. The fact that parties' promises are not strictly reciprocal is no reason to deny enforcement of the promises. See, e.g., Civil Code §3386, providing that specific performance is an appropriate remedy even if the right to it is not reciprocal.

4. <u>Basing the doctrine of promissory estoppel on an after-the-fact assessment of the equities of a contract undermines the purpose of the doctrine and the fundamental goal of contract law</u>.

The lower courts' decisions in this case add a new factor to the test for applying promissory estoppel. It is no longer sufficient to determine whether a party should reasonably expect its promise to result in detrimental reliance, and whether reasonable detrimental reliance actually occurred.

The decisions below require courts to engage in a standard-less evaluation of the relative equities affecting the parties, even after it has been determined (or conceded) that a promise was intended to, and did, result in substantial detrimental reliance. Instead of enforcing a promise because the promisor intended the other party to rely, and the other party actually did detrimentally rely, the Court of Appeal has converted the doctrine of promissory estoppel into a broad inquiry about whether the promise was in the promisor's best interest in the first place.

The Court of Appeal's approach is fundamentally inconsistent with the most basic principle of contract law, as codified in Civil Code §1636:

> A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.

The Court of Appeal's rationale encourages courts to ignore the mutual intention of the parties at the time of contracting, and to instead substitute the court's after-the-fact determination of what the parties should have agreed to. The inevitable result will be more litigation, increased uncertainty about a promisor's obligations, and increased costs of doing business in California.

Moreover, the Court of Appeal's test will lead to more inequity, rather than less. As this Court recognized in *Drennan*, injustice will result if a party is allowed to escape responsibility for a promise when the

promisor "had reason not only to expect plaintiff to rely on its bid ***but to want him to.***" *Drennan v. Star Paving Co., supra*, 51 Cal.2d at 414, 415 [emphasis added].

It is undisputed that the Contract required appellants to provide "substantial investment during this development period," and it is undisputed that they did so. Thexton, on the other hand, presented absolutely *no evidence* that he expended any sums in reliance on the Contract, or that he suffered any loss during the period of appellants' performance. The trial court made no finding that Thexton did *not* voluntarily enter into the Contract. Moreover, it is undisputed that nothing would prevent Thexton from using the approvals and development progress achieved by appellants for his own benefit if the Court allows defendant to avoid his obligations under the Contract.

In short, the facts of this case demonstrate that when courts attempt to evaluate the overall equities of a contractual relationship without basing that evaluation on the expressed mutual intentions of the parties, there is no standard by which to measure the result, and there is no reason to assume that the result will do equity as to the parties. On the other hand, it is virtually certain that attempting to apply such a test without any standard for measuring what is "equitable" will lead to more uncertainty and litigation by parties about what they thought they had promised one another.

5. Defendant's attempt to avoid the doctrine of promissory estoppel on procedural grounds is wrong as a matter of law.

Plaintiffs continue to object to defendant's attempt to belatedly argue (for the first time in his proposed Statement of Decision) that Plaintiffs' promissory estoppel argument must be rejected because it was not pled as an affirmative grounds for relief.

a. The doctrine of promissory estoppel was raised by plaintiffs during trial, without objection from, or prejudice to, defendant.

Defendant never objected to plaintiffs' promissory estoppel arguments or evidence at any time during trial, or in defendant's written Closing Argument and Supplemental Trial Brief – despite the fact that the doctrine of promissory estoppel was expressly raised during the trial and in plaintiffs' Joint Post-Trial Brief. R.T. 123: 2-125:1; 280:20-284:24.[4]

> It has long been settled law that where (1) a case is tried on the merits, (2) the issues are thoroughly explored during the course of the trial and (3) the theory of the trial is well known to court and counsel, the fact that the issues were not pleaded does not preclude adjudication of such litigated issues and a review thereof on appeal.

Frank Pisano & Associates v. Taggart (1972) 29 Cal.App.3d 1, 16 (citation omitted); Weil and Brown, *California Practice Guide: Civil Procedure Before Trial* (Rutter Group Rev. #1 2006) "Pleadings," ¶6:10, p. 6-3.

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[4] In fact, during a side bar in Chambers early during the trial, the trial court expressly invited the parties to discuss and brief a theory of recovery that was based on detrimental reliance by plaintiffs or promissory estoppel.

Furthermore:

> No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits ....

C.C.P. §469, quoted in *Frank Pisano & Associates, supra*, 29 Cal.App.3d at 16. In this case, plaintiffs offered unambiguous testimony that the Contract should be enforced because plaintiffs invested substantial time and money in reliance on defendant's promise to perform. R.T. 121:18-125:5; 206:15-214:24.

As the Court of Appeal recognized, defendant's and the trial court's reliance on *Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 48, is misplaced, because in that case the court upheld a demurrer without leave to amend only after finding that:

> Appellants do not suggest any facts they could allege which would remedy the defects discussed above. To the contrary, they ask that we reverse to allow them to proceed with their action "as pleaded."

Id. at 55. *Smith v. City and County of San Francisco* did not address any alleged variation between an initial pleading and the evidence presented at trial, and it did not consider evidence or arguments that are made relevant by a defendant's answer and affirmative defenses, as opposed to solely the plaintiff's complaint.

b. Defendant's affirmative defenses allowed plaintiffs to raise the theory of promissory estoppel without the need to amend their complaints.

Defendant's assertion that plaintiffs were required to amend their complaints in response to defendant's affirmative defenses, to expressly plead the doctrine of promissory estoppel, is also contrary to law. As explained in *Weil and Brown, supra*, "Pleadings," ¶6:10. p. 6-3:

> In determining the issues raised by the pleadings, the pleadings of *both* parties must be considered. Issues raised in the answer may support relief on theories not specifically raised in the complaint.

For example, in *Estrin v. Superior Court* (1939) 14 Cal.2d 670, 676, this Court held that a defendant's answer to a breach of contract action sufficiently enlarged the issues to allow plaintiff to recover on a quantum meruit theory, even though that theory was not pled in the complaint.

> ***Therefore, it appears that the answer sufficiently enlarged the issue tendered by the complaint to have permitted the reception of evidence relating to the question whether the sign so constructed and installed on defendant's premises was in accordance with the specifications of the agreement and thus entitled plaintiff to the full contract price***; also, evidence thereby was admissible with respect to the amount of the reasonable value of said sign if it was found not to have been so constructed or installed ... but nevertheless had been accepted and retained by defendant. . . . A party is entitled to "any and all relief which may be appropriate under the scope of his pleadings and within the facts alleged and proved," irrespective of the theory upon which they may have been alleged.

Estrin v. Superior Court, supra, 14 Cal.2d at 677-789 (emphasis added).

As in *Estrin*, defendant's answer – and in particular defendant's first

affirmative defense – "sufficiently enlarged the issues tendered by the complaint" to allow plaintiffs to argue that consideration was supplied by the doctrine of promissory estoppel, in addition to the other benefits conferred and prejudice suffered by plaintiffs as part of the Contract.

CONCLUSION

The parties to this appeal entered into a Contract that was designed to benefit both parties, and to allow them to allocate the costs and risks of pursuing a shared but uncertain goal. There is nothing inherently improper, unfair, or unworkable about the allocation of risks and responsibilities set forth in the Contract.

With the assistance of SFP, Steiner immediately undertook his obligations under the Contract, and Steiner and SFP began to incur the substantial expense that all parties knew would be required to pursue the Contract's objective. Defendant observed plaintiffs' performance and accepted the initial benefits of that performance when he affirmed the Contract by signing the Addendum some four months later. Defendant then continued to assist and observe plaintiffs' performance for more than one year, until he suddenly reversed his position and attempted to cancel escrow. In the words of the trial court, defendant "obstructed the thing and he canned the whole program ... at the time it was all finished, virtually,"[5]

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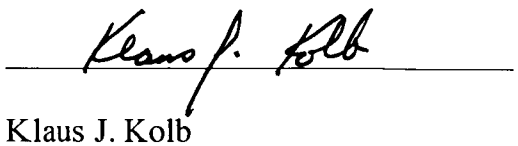
[5] Trial Court's comments at R.T. 240:26-241:3.

and just before plaintiffs would have been entitled to their benefit of the bargain.

Nothing in California law requires the incredibly unfair result accomplished by the lower courts' decisions. Plaintiffs' promise to expeditiously pursue the parcel split at their cost was sufficient consideration to hold defendant to his bargain of selling the Property at the agreed upon price if they were successful. Moreover, plaintiffs' diligent efforts to perform in reliance on defendant's promise, and defendant's acceptance of plaintiff's performance and substantial investment – all as expressly intended by the parties and the Contract – should be sufficient independent consideration to hold defendant to his bargain under the doctrine of promissory estoppel.

Mr. Steiner and Siddiqui Family Partnership request the Court to enforce the obvious intent of the parties at the time they entered into the Contract, and to reverse the judgment of the trial court.

Respectfully submitted November 17, 2008,



Klaus J. Kolb
Attorney for Appellant
SIDDIQUI FAMILY PARTNERSHIP

By Robert J. Kolb
SBN 146531

Robert Vaughan

Robert Vaughan
Attorney for Appellant
MARTIN A. STEINER

CERTIFICATE OF WORD COUNT

The text of OPENING BRIEF ON THE MERITS FOR APPELLANTS MARTIN A. STEINER and SIDDIQUI FAMILY PARTNERSHIP consists of 13,968 words, as counted by the Corel WordPerfect version 12 word-processing software I used to generate this Brief.

Dated: November 17, 2008.

Klaus J. Kolb
Attorney for Appellant
SIDDIQUI FAMILY PARTNERSHIP

EXHIBITS TO APPELLANTS' BRIEF (PER CRC 8.204(d))

Exhibits	Description
1	REAL ESTATE PURCHASE CONTRACT
2	FIRST ADDENDUM TO THE REAL ESTATE PURCHASE AGREEMENT DATED SEPTEMBER 3, 2003, BETWEEN MARTIN A. STEINER AND/OR ASSIGNEE HERINAFTER CALLED "BUYER" AND FAS FAMILY TRUST, PAUL THEXTON, HEREINAFTER CALLED "SELLER"
3	COUNTY OF SACRAMENTO PLANNING DEPARTMENT APPLICATION INFORMATION FORM
4	AUGUST 19, 2004 LETTER FROM PAUL THEXTON TO COUNTY OF SACRAMENTO PLANNING AND COMMUNITY DEVELOPMENT

Exhibit "1"

REAL ESTATE PURCHASE CONTRACT

Admitted

In Orangevale, California, on September 3, 2003, Martin A. Steiner and/or Assignee, hereinafter called "Buyer", offers to pay to FAS Family Trust, Paul Thexton, hereinafter called "Seller", the purchase price of Five Hundred Thousand Dollars ($500,000.00) for 10 acres of a 12.29 acre property situated in the County of Sacramento, State of California, hereinafter called "Property" (defined in Exhibit A), and more particularly described as follows:

APN #224-0210-013-0000
8585 Chris Lane
Orangevale, CA 95662

TERMS OF SALE:

1. Upon Seller's acceptance escrow shall be opened and $1,000.00 (One Thousand Dollars) shall be deposited by Buyer, applicable toward purchase price.

2. During the escrow term, Seller shall allow Buyer an investigation period to determine the financial feasibility of obtaining a parcel split for development of the Property. Buyer shall have no direct financial obligation to Seller during this investigation period as Buyer will be expending sums on various professional services needed to reach the financial feasibility determination. Buyer hereby warranties that all fees shall be paid for said professional services by Buyer and neither the Seller nor the Property will in any way be obligated or indebted for said services.

3. Upon mutual execution of this contract, at Buyer's cost, Buyer shall order a Preliminary Title Report on the subject Property and open escrow with Cindy Coon, Stewart Title of Sacramento, 555 Capitol Mall, #280, Sacramento, CA 95814, hereinafter called "escrow holder". The parties shall execute escrow instructions as requested by the escrow holder, which are consistent with the provisions of this Contract. The provisions of this Contract shall constitute joint escrow instructions to the escrow holder. Said instruction shall provide for escrow closing as outlined in this agreement.

4. The Preliminary Title Report on the subject Property, together with full copies of all exceptions set forth therein, including but not limited to covenants, conditions, restrictions, reservations, easements, rights and rights of way of record, liens and other matters of record shall promptly be delivered to Buyer. Buyer, shall have 30 days after receipt of said Preliminary Title Report, together with full copies of said exceptions, within which to notify Seller in writing, of Buyer's disapproval of any exceptions shown in said title report. In the event of such disapproval, Seller shall have until the date for closing of escrow within which to attempt to eliminate any disapproved exception(s) from the Policy of Title Insurance to be issued in favor of Buyer and if not eliminated then the escrow shall be cancelled unless Buyer then elects to waive its prior disapproval. Failure of Buyer to disapprove any exception(s) within the aforementioned time limit shall be deemed an approval of said Preliminary Title Report. The Policy of Title Insurance shall be a California Land Title Association Standard Coverage Policy with a liability not exceeding the total purchase price. Title and escrow fees and shall be paid 50% by Seller and 50% by Buyer.

5. Buyer will pay for the required civil engineering and surveying for the entire parcel map. Any agency requirements of Seller's remaining 2.29 acre parcel will be paid by Seller. Any agency requirements for planning, development or entitlement of the 10 acre parcel will be paid by Buyer.

6. Seller will allow an emergency access road easement across the newly created 2.29 acre parcel to the newly created 10 acre parcel if required by any agencies.

7. Buyer will allow a 25 foot easement (If necessary) along the mutual property line for farming access to Seller.

8. Buyer will not construct a home within 100' of Seller's existing home at its present location.

9. Seller will retain mineral and water rights of the newly created 10 acre parcel 150 feet below the surface. Seller will have no surface rights to the newly created 10 acre parcel.

10. If any condition herein stated has not been eliminated or satisfied within the time limits and pursuant to the provisions herein, or if, prior to close of escrow, Seller is unable or unwilling to remove any exceptions to title objected to, and Buyer is unwilling to take title subject thereto, then this Contract shall at the end of the applicable time period, become null and void.

11. Real property taxes, bonds, rentals, premiums on insurance accepted by Buyer, interest on encumbrances and operating expenses, if any, shall be prorated as of the date of close of escrow. Seller shall pay the cost of any transfer tax required by any lawful authority.

Buyer's Initials: MM

Seller's Initials: P. J.

12. Possession of the Property shall be delivered to the Buyer on the date of close of escrow, unless otherwise provided herein.

13. This Contract shall constitute the entire Real Estate Purchase Contract between Buyer and Seller and supersedes any and all agreements between the parties hereto, regarding the subject Property, which are prior in time to this Contract.

14. Seller warrants that Seller has not received, nor is aware of any notification from the building department, health department or such other City, County or State authority having jurisdiction, requiring any work to be done on or affecting the Property. Seller further warrants that in the event any such notice or notices are received by Seller prior to the close of escrow and Seller is unable to or does not elect to perform the work required in said notice at Seller's sole cost and expense on or before the close of escrow, said notices shall be submitted to Buyer for his examination and written approval. Should Buyer fail to approve said notice and thereby elect not to acquire the Property subject to the effect of same, within five (5) days from the date Seller submits said notice to Buyer, then this Contract shall be cancelled without further liability to either party.

15. Time is of the essence of this Contract.

16. This contract is the entire agreement of the parties and may not be amended except by a written agreement signed by both parties. Any addendum attached hereto and signed by both the Buyer and Seller shall be deemed a part hereof.

17. Buyer hereby agrees to purchase the above-described Property for the price and upon the terms and conditions herein expressed. All tenders and notices required hereunder shall be made and given to either of the parties hereto at their respective addresses herein set forth. In the event any litigation or other legal proceedings are instituted to enforce or declare the meaning of any provision of this Contract, the prevailing party shall be entitled to its costs, including reasonable attorneys fees. Buyer and Seller hereby acknowledge receipt of a copy of this Contract.

EXPIRATION:

Unless this purchase contract is accepted by Seller, fully executed and returned to Buyer by 5:00 p.m. on September 8, 2003, this Contract shall expire and all terms and conditions shall be null and void.

CONTINGENCIES:

The Buyer shall have from date of acceptance until the closing of escrow to satisfy or waive the items listed herein below:

1. Seller is aware that Buyer plans to subdivide, apply for planning entitlements and develop 10 acres from the existing parcel and agrees to cooperate, as needed, with Buyer as Buyer attempts to obtain the necessary permits and authorizations from the various local jurisdictions.

2. Buyer, at his sole option and expense, will conduct all necessary investigations, engineering, architectural and economic feasibility studies as outlined earlier in this Contract.

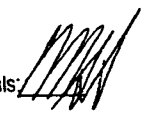
3. Both Buyer and Seller understand that Buyer could have substantial investment during this development period.

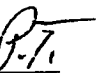
4. Buyer shall hereby indemnify and hold Seller harmless for any acts, errors or omissions of Buyer or Buyer's agents; and Buyer and Buyer's agent hereby agree that, upon the performance of any test, they will leave the Property in the condition it was in prior to those tests.

5. By acceptance of this offer, the Seller has granted Buyer and/or Buyer's agents, the right to enter upon subject Property for the purpose of conducting said tests and investigations.

6. Buyer shall indemnify and hold Seller harmless for any costs associated with Buyer's investigations. In the event that this contract is terminated prior to the close of escrow, Buyer shall deliver to Seller the originals or copies of all information, reports, tests, studies and other documentation obtained by Buyer from independent experts and consultants concerning the Property.

7. It is the intent of Buyer that the time period from execution of this contract until the closing of escrow is the time that will be needed in order to be successful in developing this project. It is expressly understood that the Buyer may, at its absolute and sole discretion during this period, elect not to continue in this transaction and this purchase contract will become null and void.

Buyer's Initials: 

Seller's Initials 

CLOSE OF ESCROW:

Upon successful completion of subdividing the 10 acres from the existing parcel, Buyer will pay Seller the balance of the purchase price to escrow and close immediately.

Buyer will move expeditiously with the parcel split. It is anticipated it will take one to three years, due to existing governmental requirements.

Buyer will give quarterly reports to Seller as to progress of the parcel split.

If parcel split is not completed by September 1, 2006, this real estate purchase contract will be cancelled.

COOPERATION:

The parties hereto agree to cooperate, and shall execute any and all documents, maps or other matters reasonably necessary to effectuate the purposes of this Agreement (including IRS-1031 exchange for benefit of Buyer and Seller), within a reasonable time frame.

WRITTEN NOTICES:

All notices, authorizations, waivers, etc., required to be given under this contract shall be sent by Seller to Buyer and by Buyer to Seller at the addresses listed below. The parties hereby agree to notify each other of any change in their addresses which may occur during the term of this contract. All required written notice(s) shall be deemed given from one party to the other when said notice(s) is/are placed with the United States Postal Service, proper postage prepaid.

BUYER:

MARTIN A. STEINER
8999 Greenback Lane, 2nd Floor
Orangevale, CA 95662

SELLER:

FAS FAMILY TRUST
8585 Chris Lane
Orangevale, CA 95662

ACCEPTANCE OF CONTRACT:

BUYER:

MARTIN A. STEINER,
An individual

By: _____ Date: 9-4-03
Martin A. Steiner

SELLER:

FAS FAMILY TRUST

By: _____ Date: 9-4-03
Paul Thexton

Exhibit "2"

2
Admitted

FIRST ADDENDUM TO THE REAL ESTATE PURCHASE AGREEMENT DATED SEPTEMBER 3, 2003 BETWEEN MARTIN A. STEINER AND/OR ASSIGNEE HERINAFTER CALLED "BUYER" AND FAS FAMILY TRUST, PAUL THEXTON, HEREINAFTER CALLED "SELLER"

1. Item 7 - Deleted

2. Item 8 - Deleted

3. Buyer and Seller agree to the lot configuration of 10 acres (Exhibit A1). The proposed property lines can be adjusted with Buyer's and Seller's approval. If the newly created parcel is over 10 acres, then the price will be increased by the square footage price:

   Original Agreement – 10 acres for $500,000; 10 acres x 43,560/$500,000 = $1.1478 per square foot.

   Possible Configuration – 10.17 acres x 43,560 X $1.1478 per square foot = $508,481(new price).

   It is agreed that the remaining parcel (Buyer's remainder) will be not less than 2 acres.

4. Buyer will demo the old barn/cattle yard and old home at no cost to Seller.

5. Buyer will provide a standard water hookup at no cost to Seller.

ACCEPTANCE OF CONTRACT:

BUYER:

MARTIN A. STEINER,
An individual

By: _____
Martin A. Steiner

Date: 1-8-04

SELLER:

FAS FAMILY TRUST

By: _____
Paul Thexton

Date: 1-8-04

EXHIBIT A1

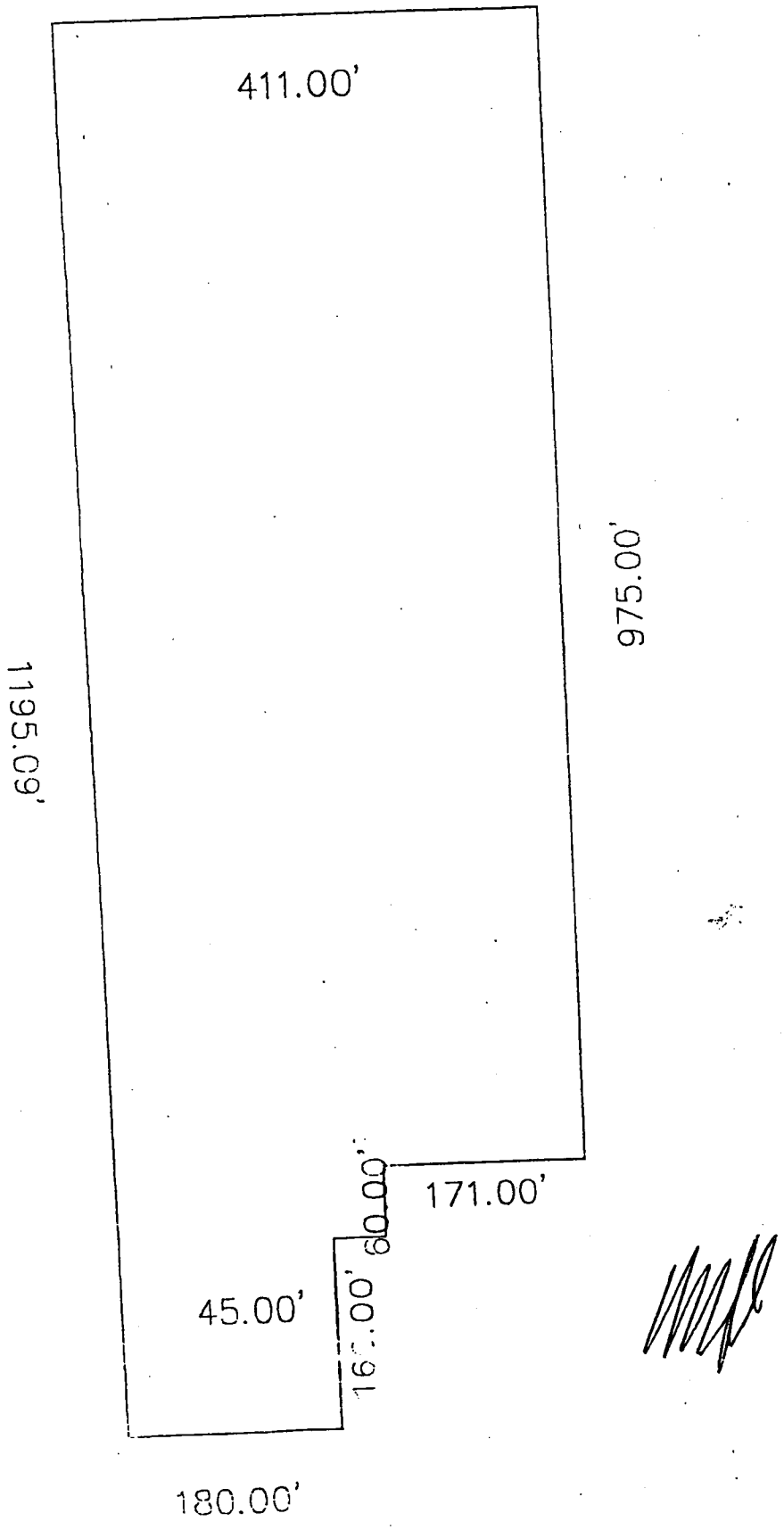


Exhibit "3"

2003-112

COUNTY OF SACRAMENTO
PLANNING DEPARTMENT APPLICATION INFORMATION FORM

PLEASE MAKE AN APPOINTMENT TO FILE YOUR PLANNING APPLICATION – CALL (916) 874-6141 04-PMR-0385

1.
- ☐ General Plan Amendment
- ☐ Community Plan Amendment
- ☐ Special Development Permit
- ☐ Rezoning
- ☐ Development Plan Review
- ☒ Tentative Parcel Map
- ☐ Special Review of Parking
- ☐ Other

- ☐ Tentative Subdivision Map
- ☐ Vesting Subdivision Map
- ☐ Use Permits
- ☐ Exceptions
- ☐ Variance
- ☐ Mobilehome Cert. of Compatibility
- ☐ Boundary Line Adjustment

OFFICIAL USE ONLY
Control No.: _____

3
Admitted

☐ Zoning Enforcement Referral

NOTE: AN INCOMPLETE APPLICATION CANNOT BE SCHEDULED FOR HEARING.
The Zoning Code requires specific material to be submitted in conjunction with this form. The required items are indicated on the attached and other instruction packets. The applicant is responsible for accuracy.

PROPERTY

2. Project Name (if any): TPM 8585 CHRIS LANE
3. Site Address or Location: 8585 Chris Lane, Orangevale, Calif 95662
4. Assessor's Parcel Nos.: 224-0210-013
5. Total Acres: Gross 12.29 Net _____
6. Requested Application in Detail: Tentative parcel Map to Subdivide an existing 12.29± acre parcel into 4 parcels plus one remainder parcel.
7. **Justification for Each Application: On a separate sheet, to be attached to this form, prepare a detailed statement explaining why you believe your request(s) is justified.**

CONTACTS

8. Property Owner: FAS FAMILY TRUST
Address: 8585 CHRIS LANE
ORANGEVALE CA 95662
Telephone: 300-3067 Fax: _____
Contact: PAUL Correspondence ☐
Developer: MARTIN A STEINER
Address: 8989 GREEN BACK LN
ORANGEVALE CA 95662
Telephone: 988-6306 Fax: 988-6316
Contact: MARK STEINER Correspondence ☐

Applicant: JAVED T SIDDIQUI P.E
Address: 1808 J ST, SACRAMENTO
CA 95814
Telephone: 441-6708 Fax: 441-5336
Contact: Correspondence ☐
Arch/Eng: JTS ENGINEERING CONSULTANTS INC
Address: 1808 J ST, SACTO, CA 95814
Telephone: 441-6708 Fax: 441-5336
Contact: JAVED T SIDDIQUI Correspondence ☐

OFFICIAL USE ONLY

Hearing Body: _____
Location: _____
Request: _____
Applicable Zoning Code Sections: _____

Logged by: _____ E.I.C. _____
Community: _____
G/P: _____
C/P: _____
Zoning: _____
Grid: _____

APPLIES TO GENERAL PLAN AMENDMENTS, COMMUNITY PLAN AMENDMENTS AND REZONES

9. Existing General Plan Land Use Categories	Gross Acres	Proposed General Plan Land Use Categories	Gross Acres

10. Existing Land Use Zone	Gross Acres	Proposed Land Use Zone	Gross Acres

11. Is the entire acreage of the project or parcel to be rezoned? Yes ☐ No ☒
12. Is public water available. Yes ☒ No ☐
13. Is public sewer available. Yes ☒ No ☐

RESIDENTIAL PROJECTS ONLY

PROPOSALS FOR CONSTRUCTION OF NEW RESIDENTIAL, COMMERCIAL OR INDUSTRIAL BUILDINGS OR SPACE

14. Has a prior residential project been approved for all or part of this project? Yes ☐ No ☒
15. How many residential dwelling units are requested? TOTAL 4 Indicate total number of units in each category: Single Family 4 Halfplex _____ Duplex _____ Mobilehomes _____ Apartments _____ Condominiums _____ Townhomes _____ Other _____
16. If apartments, townhomes or condominiums are proposed, indicate bedroom distribution:
One bedroom units and studios _____
Two bedroom units _____ Three bedroom units _____
Do you intend to market the units for sale? _____ or rent? Lots only.

COMMERCIAL/INDUSTRIAL PROJECTS ONLY

17. Indicate the type of commercial/industrial development proposed: (check each that applies)
☐ Retail ☐ Other Commercial ☐ Medical/Dental Office ☐ High Tech Office
☐ Business/Professional Office ☐ Mini Storage ☐ Industrial ☐ Warehouse ☐ Other
Please provide additional descriptions as appropriate: _____

18. What is the gross and leasable square footage for each category indicated above?

Type	No. of Buildings	Gross Square Footage	Leasable Square Footage

19. Authority to File Application (check one) * Attach evidence of authority.
Ownership ☐ Power of Attorney* ☐ Contract to Purchase* ☐ Other (specify)
20. I also certify that I have consulted the current Hazardous Waste and Substances Sites List, developed pursuant to AB 3750, and found that my project site is _____ is not _____ on the list.
21. **I hereby certify that the above information and accompanying documents are true and accurate to the best of my knowledge and agree to pay all fees required to complete processing of this application. The cost for preparation of environmental documents pursuant to CEQA will be billed separately based on set hourly rates and actual time and materials used.**

APPLICANT: _____ Date: 5-15-04

PROPERTY OWNER: Paul T. Thacker Date: 5-15-04

_____ Date _____

(Applications may not be accepted without signature of property owner or his official agent with Power of Attorney.)

2003-112

Control No. 04 PMR-0386.

STATEMENT OF APPLICANT RESPONSIBILITY

Dear Applicant:

Please read the following statement outlining your responsibilities in the application hearing process.

Amendment to California Law (AB 884), adopted in 1977 and effective January 1, 1978, require the County of Sacramento and all other jurisdictions in the state to take final action to approve or disapprove a request like yours within one year of the County's acceptance of your application as complete. In most cases, the County has approved requests like yours in significantly less time. However, the legislation now requires the County to "count down" the days so that requests are not inadvertently approved without approval by the Board of Supervisors or a designated body.

The law requires Sacramento County to inform you within 30 days after the application is submitted if your application is incomplete for our needs. If the application is complete and has all the information we need, the processing will be initiated immediately. If additional data is needed, a letter will be sent to your specifically stating the information needed. The staff will not certify the applications completed until all the requested items have been submitted to the County and the required fees have been paid.

PLEASE BE ADVISED THAT THIS APPLICATION IS NOT APPROVED UNTIL THE ULTIMATE HEARING BODY HAS TAKEN ITS FINAL ACTION AND ALL APPEALS EXHAUSTED. ANY RECOMMENDATIONS OR COMMENTS BY STAFF OR ACTIONS BY INTERMEDIATE HEARING BODIES ARE ONLY ADVISORY AND SHOULD NOT BE RELIED ON FOR THE PURPOSES OF MAKING FINANCIAL COMMITMENTS.

Your application will be heard in a public hearing, and it is important that a reasonable effort be made to advise your neighbors or adjoining property owners (those within 500 feet of your property) of the time and date that your application will be heard. This provides an opportunity for those most affected by a proposed use to provide input to the hearing body. The County is required by law to notify all those property owners within 500 feet that are shown on the latest assessment roll. It is the responsibility of the applicant to contact the Assessor's Office and list the names and addresses on a form that is attached to the application. Following is a statement for the applicant to read and sign.

I understand that it is my responsibility to pay the entire filing fees at time of submittal. Also, the application is not considered complete until the total Planning Department fees have been collected.

I understand that it is my responsibility to prepare a 500-foot radius map as described on the "Instruction to Applicant" sheet, to list all the parcel numbers within the 500-foot radius, and to record the name and address (including zip codes) of the property owners of all parcels. I certify that a) the property owner's list is complete and accurate as shown on the latest assessment roll in the County Assessor's Office, and b) I have read and understand the above information regarding application processing.

My mailing list includes a total of ____ pages and _____ property owners.

Signed Paul T. Taylor Date 5-15-04

NOTE: The original of this form shall be attached to the signed application forms.

Exhibit "4"

4

Paul Thexton
8585 Chris Lane
Orangevale, CA 95662

Admitted

August 19, 2004

County of Sacramento
Planning and Community Development
827 Seventh Street, Room 230
Sacramento, CA 95814

Re: FAS Tentative Parcel Map
8585 Chris Lane, Orangevale, CA 95662
APN: 224-0210-013

To Whom It May Concern:

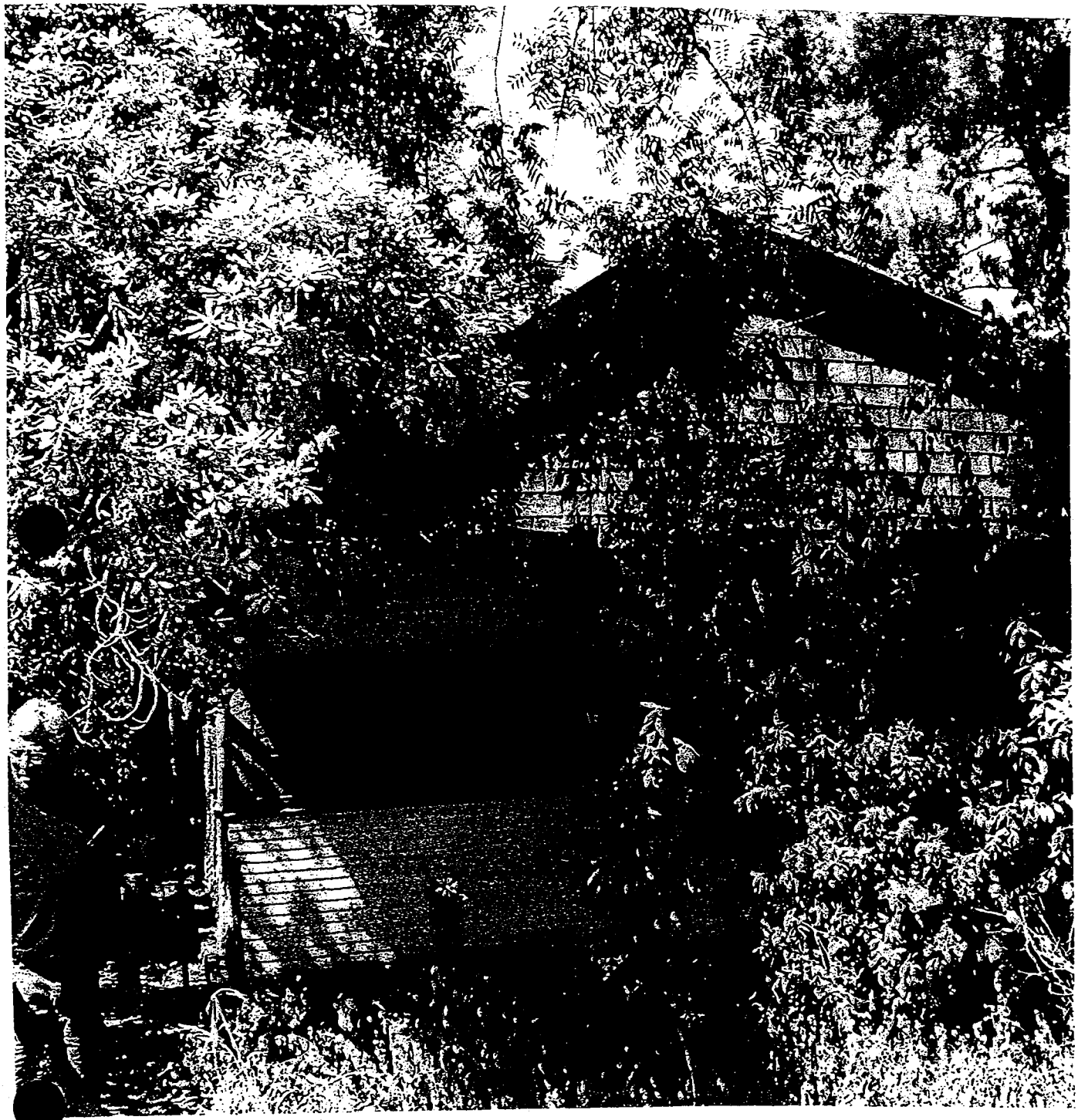
The existing home on the property was in great need of repair. It is presently uninhabitable and I plan on razing it in the near future. As you can see from the enclosed pictures, the home has no historical significance.

Sincerely,

Paul T Thexton 8-19-04

Paul Thexton
FAS Family Trust

Date



PROOF OF SERVICE

Court: **SUPREME COURT OF THE STATE OF CALIFORNIA**

Case Name: *MARTIN A. STEINER, et al. v. PAUL THEXTON as Trustee of FAS FAMILY TRUST, etc.*

Case Number: **Supreme Court No. S164928**
Third District Court of Appeal No. C054605
Sacramento County Superior Court No. 04AS04230

I am a citizen of the United States, employed in SACRAMENTO County, California. I am over the age of eighteen years and not a party to the above-entitled action. My business address is: 400 Capitol Mall, 11th Floor, Sacramento, CA 95814. On: November 17, 2008, I served the following documents:

(1) **OPENING BRIEF ON THE MERITS FOR APPELLANTS MARTIN A. STEINER and SIDDIQUI FAMILY PARTNERSHIP**

MANNER OF SERVICE

XX U.S. MAIL: By causing a true copy of the above documents to be placed into a sealed envelope, addressed as listed below, and depositing with the U.S. Postal Service on the date indicated above, with postage prepaid. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing as stated above.

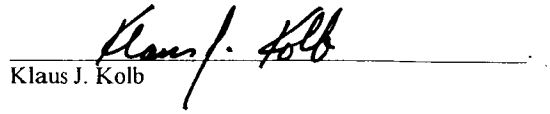
_____ PERSONAL SERVICE: By causing a true copy of the above documents to be personally delivered by hand to the offices of the addressee(s) listed below:

XX OTHER: By causing a true copy of the above documents to be delivered to the addressee(s) listed below by and/or through:
EXPRESS MAIL to Supreme Court of California

PARTIES SERVED AND ADDRESSES

DAVID L. PRICE, ESQ. 3300 Douglas Blvd., Suite 125 Roseville, CA 95661 Fax: (916) 772-5357	Attorney for Defendant PAUL THEXTON, Trustee of FAS Family Trust (One copy)
ROBERT VAUGHAN, ESQ. 11879 Kemper Road, Suite 1 Auburn, CA 95603 Fax: (530) 823-6119	Attorney for Plaintiff MARTIN A. STEINER (One copy)
SUPREME COURT OF THE STATE OF CALIFORNIA	(Original plus 13 copies) VIA EXPRESS MAIL
THIRD DISTRICT COURT OF APPEAL	(One copy)
HONORABLE LLOYD A. PHILLIPS, JR. SACRAMENTO COUNTY SUPERIOR COURT	(One copy)

I declare under penalty of perjury that the foregoing is true and correct. Executed this November 17, 2008, in Sacramento, California.



Klaus J. Kolb