

Defendant Marie W. Ruhl (“Ruhl”) agreed to sell approximately 30 acres of land in Sussex County, Delaware to Bay Development, a predecessor-in-interest to Plaintiff Georgetown Crossing LLC (the “Purchaser”). The lands were part of a larger tract owned by Ruhl. She believed—mistakenly—that the lands to be conveyed had been duly subdivided and could legally be sold. Largely because of the languid pace of the Purchaser’s due diligence efforts, the subdivision problem was not uncovered in time for the acquisition to close by the contractual deadline, a deadline that had already been extended by the parties’ agreement. In addition, in the days leading up to the scheduled closing, the Purchaser raised title defects as another obstacle to closing. After the closing date had passed and it was clear that Ruhl would not consummate the agreement, the Purchaser, alleging that it had been ready, willing, and able to close but for the lack of the necessary subdivision approval, an approval that Ruhl implicitly, if not explicitly, represented had been obtained, brought this action for specific performance and for damages incurred because of the failure of Ruhl to close in accordance with their agreement. This Memorandum Opinion constitutes the Court’s post-trial findings of fact and conclusions of law on Purchaser’s claim for specific performance.¹

¹ The parties agreed to bifurcate the Purchaser’s claims for specific performance and for damages. Pretrial Stipulation (“Pretrial Stip.”) ¶ I.A.

I. Findings of Fact²

In 1972, Ruhl took title to a 168 acre tract at the northwest corner of the intersection of Route 113 and Route 9, just west of the Town of Georgetown (the “Town”), in Sussex County, Delaware (the “Ruhl tract”).³ Several decades later, commercial developers became interested in the Ruhl tract.⁴ After numerous conversations with a local realtor, Janice Jones (“Jones”), Ruhl agreed to put the corner portion on the market.⁵ However, Ruhl was not willing to sell the entire corner portion; she wanted to retain an approximately one-acre parcel that fronted Route 113. That parcel came to be known as “Parcel A.” The remainder of the corner site (approximately 30 acres) was made available for purchase.⁶

In 1996, Ruhl received an offer from Wilton Partners to purchase a portion (15 acres) of the corner site—the parties involved referred to this 15-acre portion as “Parcel C.”⁷ Later on, Wilton Partners expanded its initial offer to include the balance of the corner site—the additional portion was labeled “Parcel B.” No subdivision plan or deed identifying Parcels A, B, and C was ever recorded: these delineations appear to be, simply, the result of rough, hand-drawn estimates that Jones made on a tax map in the course of selling the property.

² For convenience, some findings of fact are set forth in Part III, *infra*.

³ Joint Exhibit (“JX”) 5.

⁴ Pl.’s Ex. 74.

⁵ The corner site comprised only a part of the Ruhl tract.

⁶ Years before, a parcel of one acre at the intersection had been sold for a gasoline station.

⁷ Pl.’s Ex. 72.

During the feasibility period, Wilton Partners discovered that water and sewer would not be available if the property remained in the jurisdiction of Sussex County; thus, with Ruhl's consent, it sought to have Parcels A, B, and C annexed into the Town.⁸ As part of the annexation process, a survey was prepared which identified the boundaries of Parcels A, B, and C.⁹ The Town approved the annexation on November 12, 1997;¹⁰ however, contrary to Ruhl's understanding, the certification of the annexation was not effective because it was not properly recorded.¹¹

After obtaining approval of the annexation, Wilton Partners pulled out of the deal, and Ruhl placed Parcels B and C back on the market. On September 6, 2001, Ruhl entered into an Agreement of Sale (the "Agreement") with Bay Development: this contract and the sequence of events that followed its execution form the basis of the dispute before the Court.¹²

The Agreement provided for the purchase and sale of "that certain tract of real property with the buildings thereon containing approximately 30 acres shown

⁸ Even though Wilton Partners was only purchasing Parcels B and C, it sought annexation of Parcel A as well, because that was more convenient.

⁹ JX 33.

¹⁰ Pl.'s Ex. 59.

¹¹ Defs.' Ex. 39.

¹² JX 1. Bay Development assigned its interests in the Agreement to the Purchaser. Pretrial Stip. at 9. In December 2003, Ruhl conveyed a one-half interest in the Ruhl tract to her daughters, Diane Blanton ("Blanton") and Jane Rensi ("Rensi"), both of whom were thereafter joined as defendants. At times, Ruhl, Blanton, and Rensi are referred to, collectively, as the "Defendants."

as parcels B and C . . . located in the Town of Georgetown, Sussex County, DE, being part of tax parcel #1-35-19.00-12.00 as shown on The Sussex County, Property Map.”¹³ Ruhl reserved an easement to allow access to the small portion of land along Route 113 that she was retaining (Parcel A) by the following language: “Purchaser shall provide access to the seller through parcels B&C to parcel A retained by Seller. Purchaser acknowledges that the said Parcel A is being retained and used for commercial purposes and the access must be adequate for those purposes.”¹⁴ Significantly, the Agreement did not specify when the location of the access way would be established.

The Agreement also provided:

3.1 Purchaser at Purchaser’s sole cost and expense shall have received all approvals required by any regulatory authority to allow for the full development of the real estate

. . . .

3.3 The Record Plan is to be recorded in the office of the Sussex County Recorder of Deeds immediately after final approval by the [relevant] agencies

. . . .

4.5 If at the end of any and all the extension periods the conditions of Section 3 have not been satisfied, this agreement shall be considered null and void and all deposits shall be turned over to the

¹³ JX 1 at § 1.1.

¹⁴ *Id.*

Seller by the Seller's attorney and Purchaser and Seller shall have no further obligations towards each other.¹⁵

The Agreement set an outside closing date of 15-months from September 20, 2001.¹⁶ The Purchaser, however, encountered difficulties in obtaining potential tenants for the shopping center that it was planning. As a result, the parties committed to extend the feasibility study period until January 20, 2004.¹⁷ The Purchaser agreed to provide the Defendants with progress reports 180-days from the beginning of the new feasibility study period.¹⁸

The feasibility study extension agreement also provided: "At the end of the feasibility period, Purchaser shall commit to closing within 6 months." Thus, the Purchaser had until January 20, 2004, to decide to consummate the transaction. If it elected to go forward, it was obligated to complete settlement by July 20, 2004—in essence, it would be waiving those problems which it uncovered (or could have reasonably uncovered) as the result of its feasibility study.

In August 2003, Alan Perry ("Perry"), a principal in the Purchaser, met with Ruhl and Blanton. He complained about various development impediments, such as the lack of water and sewer capacity,¹⁹ and sought an extension. In addition, he

¹⁵ JX 1.

¹⁶ *Id.* at § 4.

¹⁷ JX 2.

¹⁸ *Id.*

¹⁹ The property was served by the Town's water and sewer systems. Unfortunately, the sewer system lacked the capacity to meet the needs of the Purchaser's proposed shopping center. Although the Town was planning to expand its sewer system's capacity, that was not expected to

floated the idea of some sort of owner financing. These concepts were not well received. Perry also provided a preliminary plan for access to Parcel A. The Defendants, again, were not pleased.

On September 12, 2003, the Purchaser in writing sought to renegotiate the Agreement before the feasibility study period expired on January 20, 2004.²⁰ However, the Defendants—who had grown frustrated with the Purchaser’s repeated requests for extension and its failure to provide the anticipated progress reports—did not accept the proposal.²¹ They waited until January 5, 2004 to reject the request formally. Nevertheless, on January 19, 2004, one day before the extended feasibility study period was to expire, the Purchaser sent notice to the Defendants of its intention to complete the purchase of the property and to proceed to closing within six months, despite the lack of sewer and water.²²

During this extension period (on or shortly before May 28, 2004), the Purchaser learned that the property had not been properly annexed and subdivided.²³ Although the Town had accepted a plot showing the various parcels for purposes of the annexation, the requirements of its Subdivision Code had not yet been satisfied. Under the applicable code provisions, Ruhl could not lawfully

occur for a few years. Moreover, until the project’s sewer needs could be accommodated, the Town would not approve a record plan for the project.

²⁰ Pl.’s Ex. 17.

²¹ Pl.’s Ex. 20.

²² Pl.’s Ex. 21.

²³ See Defs.’ Ex. 73 at § 194-6.

convey Parcels B and C until the appropriate subdivision process had been completed.²⁴ The Purchaser, or its attorney, promptly made several phone calls to Defendants' attorney, J. Everett Moore, Esquire ("Moore"). It was not until mid-June that Moore was available.

On June 24, 2004, after finally having been able to talk with Moore a few days before, the Purchaser's attorney, Douglas E. Hershman, Esquire ("Hershman") sent an e-mail that identified the subdivision problem. Based on a conversation with David Baird ("Baird"), the Town Manager, Hershman informed Moore that the subdivision process could not be completed until after the settlement date of July 20, 2004. Thus, he asked for "an amendment to the contract to extend the settlement date to allow Mrs. Ruhl to complete the subdivision process." He also identified a problem involving a land swap which adjusted the boundary line between Parcel C and the gasoline station at the intersection of Route 113 and Route 9.²⁵

Blanton received the e-mail the next day and promptly attempted to contact Moore.²⁶ When Blanton did not hear back from Moore, she sought the assistance

²⁴ Pl.'s. Ex. 51.

²⁵ Pl.'s. Ex. 71. Interestingly, the Purchaser was aware that the subdivision process involved a 30-day waiting period. Defendants have suggested that the Purchaser purposefully did not bring the subdivision defect to the Defendants' attention until it was too late for them to complete the subdivision process in time for the scheduled closing.

²⁶ Blanton called Moore "lots of times" and even visited his office. She was never able to talk with him.

of Baird, who advised her how to complete the subdivision process. After complying with her understanding of Baird's instructions, which included obtaining an approval from a Sussex County planning official and recording a plat, Blanton reasonably believed that the subdivision defects were corrected.²⁷ On July 8, 2004, she sent a letter to the Purchaser advising it that all conditions for closing had been met, and that the Defendants expected to proceed to closing in accordance with the Agreement.²⁸

Blanton's letter also recited the provision in the Agreement regarding access to Parcel A. It criticized the proposed routes for access which Perry had suggested in the summer of 2003 and suggested that the access road should run parallel with Route 113, a short distance from the shopping center entrance. The letter went on: "Upon revision of the plan and prior to establishment of roads, in order to avoid future dispute, a review of this plan needs to be supplied to us, Mrs. Ruhl and her daughters, prior to closing to insure good faith and in compliance with the contract."

Despite Blanton's efforts, the subdivision problem had not been corrected because the Town had never ratified or approved it.²⁹ On July 14, 2004, Perry

²⁷ Blanton unintentionally misled both the Sussex County planning official and Baird with inaccurate information concerning the status of the various parcels.

²⁸ Pl.'s Ex. 28.

²⁹ See Pl.'s Ex. 30.

wrote to Ruhl and Blanton, and Hershman wrote to Moore and Stephen P. Ellis, Esquire (“Ellis”), the attorney eventually retained by the Defendants because of their inability to obtain any assistance from Moore.³⁰ Hershman expressed frustration because he was not certain who was representing the Defendants and reported that, since his e-mail to Moore on June 24, 2004, he had received no response.³¹

Perry, in his letter to Ruhl and Blanton, addressed access to Parcel A. He explained that access running north from the Purchaser’s proposed entrance parallel to Route 113 immediately inside the property boundary would not work because of Delaware Department of Transportation requirements that there be sufficient separation between the entrance and any internal intersection in order to avoid having traffic backup onto the highway. He indicated a continuing willingness “to discuss alternative ways to accommodate access to the parcel you are retaining.” Perry then went on to address what he referred to as “more pressing issues”: he informed Blanton that her subdivision efforts had failed. Perry noted his surprise that Blanton had been able to record a subdivision plan and reported

³⁰ See Pl.’s Ex. 30 & 32.

³¹ Pl.’s Ex. 30. Having grown frustrated with the lack of any response from Moore, Blanton retained Ellis. Moore’s failure to provide prompt advice to the Defendants clearly contributed to the difficulties that they encountered in this matter. Ellis was at a substantial disadvantage because time was of the essence; this was a complicated matter; and he reasonably and understandably needed time to review the file in order to represent his new clients effectively.

that his attorney had informed him that the subdivision process could not be accomplished in time for the scheduled settlement. He expressed the concern that the plan, although recorded, did not bear any approval by the Town. He acknowledged that there was a stamp by a Sussex County official which indicated that the parcels were within the Town limits, but he also correctly observed that Sussex County could not ratify the subdivision of lands in the Town. In short, he concluded that “[w]ithout ratification by the Town, this subdivision is defective and of no value.” He also informed Blanton and Ruhl that there were title defects which were described in the letter sent that day to Moore and Ellis by Hershman. In addition, he noted that the recorded plan did not “reflect the land swap that was previously done with the gas station on the corner.”³²

Hershman, in his letter, also reported that the subdivision had not been done properly and, indeed, may have “compounded” the problems. He proceeded also to address title problems involving the Evergreen Lawns’ Addition and questions regarding a roadway called Laurel Street for that proposed and abandoned subdivision. Apparently, the street beds had been omitted from the deeds in the chain of title. He anticipated that litigation might result in light of “your client’s

³² *Id.*

current stance regarding consummation of the sale by 7/20/04 without regard to delivering proper and insurable title.”³³

The Defendants’ reaction to the two letters can fairly be characterized as one of skepticism. They honestly believed that the subdivision problem had been resolved. They thought that by committing, in January 2004, to proceed to settlement, the Purchaser had intended to waive any title concerns. In short, they viewed this as another effort to extort an extension in the settlement date from them.

The Defendants made it known to the Purchaser and Hershman that they insisted on closing on the agreed-upon date. On July 19, 2004, Hershman sent a letter to both Moore and Ellis indicating that settlement had been scheduled for the next morning in his Wilmington office.³⁴ The letter recited: “At that time, we will expect that you will be able to deliver good, marketable title to the property, lawfully subdivided.” The Purchaser did not expect settlement to occur. Subdivision approval for Parcels B and C had not been obtained and could not have been obtained in time for closing in accordance with the Agreement.

³³ Pl.’s Ex. 32. For reasons that are not clear, he did not address the specific provision in the Agreement controlling the disposition of title defects.

³⁴ Pl.’s Ex. 34. The Agreement designated the Purchaser’s attorney’s office as the settlement site. JX 1 at § 13.1.

Later that day, Ellis sent Hershman a letter indicating that his clients would execute a deed upon receipt of the deed, settlement sheet, and certified funds from the Purchaser.³⁵ The letter also advised: “In addition, the Deed should reflect the right of way to Parcel A as set forth in Paragraph 1.1 of the Agreement.”

The Purchaser was able to settle on July 20, 2004. The necessary financing had been obtained and the various transactional documents could have been prepared in time for settlement to occur as scheduled.

Nothing of note occurred on July 20, 2004,³⁶ and this litigation ensued.

II. Contentions

The Purchaser filed a complaint for specific performance, alleging that: (1) the Defendants failed to provide good, clear and marketable title to the property in accordance with the Agreement; (2) the Defendants refused to provide proof of the subdivision of the property and their ability legally to convey same; (3) Ruhl misrepresented that she held good, marketable, fee simple title to the property; and (4) the Defendants breached the Agreement and failed to act in good faith.

Based upon these allegations, the Purchaser seeks an order directing the Defendants to (1) file and obtain approval of an appropriate subdivision plan; (2) record the approved plan; (3) close on the sale of the property pursuant to the terms

³⁵ Pl.’s Ex. 35. At this point, the Defendants and their attorney continued to believe (wrongly, it turned out) that the subdivision problem had been solved.

³⁶ The Defendants’ attorney sent a letter that is briefly discussed at Part III C.8 *infra*.

of the Agreement; (4) pay all costs associated with this action; and (5) pay Purchaser's damages suffered as a result of the failure to close on July 20, 2004.

The Defendants offer several reasons as to why specific performance is not appropriate. First, they contend that the Purchaser did not meet its obligation to provide "commercially reasonable access" to Parcel A. This debate necessarily focuses upon the question of when delineation of the access way was necessary. Second, the Defendants attribute the problems encountered in attempting to close the transaction to the dilatory conduct of the Purchaser during what turned out to be a 28-month feasibility study. Third, the Defendants dispute that it was their burden to subdivide the Ruhl tract lawfully to create Parcels B and C. They contend that the Agreement is ambiguous; that extrinsic evidence demonstrates that it was not their obligation; and that the Town's code imposes the subdivision duty upon a purchaser of the land. Fourth, they assert an unclean hands defense because of what they view as the intentional failure of the Purchaser to inform the Defendants of any subdivision problem until less than thirty days remained before the settlement date established under the Agreement. Fifth, the Defendants claim that the Agreement must be considered "null and void" in accordance with Section 4.5 because of the failure of the Purchaser to have recorded a "record plan" on or before the settlement date. Sixth, the Defendants complain that the Purchaser

conflated title defects with a subdivision defect when it demanded that Defendants convey good title. By relying, in substantial part, upon title matters, the Purchaser, according to the Defendants, was attempting to exercise a right (an extension of the settlement date) not conferred by the Agreement. Finally, the Defendants argue that the Purchaser was not ready, willing, or able to complete settlement.³⁷

III. Analysis

A. Contract Interpretation

The Agreement is the appropriate starting point for determining the rights and duties of the parties.

In passing on a contract dispute, the Court first looks to the express terms of the contract to see whether the parties' intent can be discerned from those terms. If the terms of the contract are clear on their face, the Court will give those terms the meaning that would be ascribed to them by a reasonable third party. If, however, a contract's provisions are reasonably susceptible to two or more meanings, the Court will deem that contract ambiguous and will consider extrinsic evidence to discern the reasonable shared expectations of the parties at the time of contracting. In making this determination, the Court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole.³⁸

³⁷ Under Section 10.1 the Agreement, if "Seller fails to perform Seller's obligations under this Contract . . . (except for a default by Purchaser), . . . Purchaser may enforce the specific performance of this Contract . . ." Several of the arguments tendered by the Defendants are premised, at least in part, upon a condition for specific performance (*i.e.*, the absence of breach by Purchaser) established expressly by the Agreement.

³⁸ *BAE Sys. N. Am., Inc. v. Lockheed Martin Corp.*, 2004 WL 1739522, at *4 (Del. Ch. Aug. 3, 2004) (citations and internal punctuation omitted); *see also Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006).

B. *Specific Performance*

The Purchaser seeks an order requiring that the Defendants specifically perform their obligations under the Agreement.

[T]o merit an award of specific performance, a party must prove that he has a valid contract to purchase real property and that he is ready, willing, and able to perform his obligations under the contract. Specific performance will not be granted to a party who is in default of a material obligation under the contract The party seeking specific performance has the burden of proving entitlement by clear and convincing evidence.³⁹

The Agreement, at Section 10.1, anticipates that specific performance might be an appropriate remedy in the event of breach of the Agreement by the Defendants.

The Purchaser has established, by clear and convincing evidence, that there was a binding contract under which the Defendants were obligated to convey, in exchange for specific consideration to be provided by the Purchaser, a certain tract of land (*i.e.*, Parcels B and C). That conveyance was to occur by a date certain (*i.e.*, July 20, 2004). The Defendants did not convey Parcels B and C and could not lawfully have conveyed Parcels B and C because they had not been lawfully subdivided from other lands of the Defendants.

C. *The Arguments Against Specific Performance*

Although the burden of demonstrating the appropriateness of specific performance belongs to the Purchaser, the Defendants' arguments against

³⁹ *Peden v. Gray*, 2005 WL 2622746, at *3, 886 A.2d 1278 (Del. Oct. 14, 2005) (TABLE) (citations and internal quotations omitted).

imposing the remedy provide a convenient framework for addressing the material issues posed by this litigation.

1. Responsibility for Proper Subdivision

When Ruhl and Bay Development executed the Agreement, Ruhl believed that Parcels B and C had been annexed into the Town and were legally constituted (*i.e.*, duly subdivided). She, of course, was wrong.⁴⁰ The Agreement does not expressly address subdivision. Ruhl necessarily represented that she could sell Parcels B and C by offering them for sale. That carries with it, at least as a general matter, the commitment that the parcels are duly constituted.

Sometimes the conduct of parties to a contract can provide helpful extrinsic evidence of what the contract means.⁴¹ In this instance, once the subdivision problem was identified by the Purchaser, Blanton engaged in substantial efforts to secure prompt approval of the subdivision. Neither Blanton nor any of the attorneys who represented her ever disputed that subdivision was the Defendants' responsibility. Indeed, if the Defendants had not believed that subdivision was

⁴⁰ After learning of the technical defects in the annexation process, Blanton arranged for the necessary corrective work a few weeks before the settlement date. Thus, the annexation concerns were not an impediment to settlement.

⁴¹ *Radio Corp. of Am. v. Phila. Storage Battery Co.*, 6 A.2d 329, 340 (Del. 1939) (“It is a familiar rule that when a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the courts.”); *see also Kerwin v. Cedars Academy*, 1999 WL 1611425, at *2 (Del. Super. Feb. 26, 1999).

their responsibility, Blanton could not have been expected to report to Perry, after her efforts to secure subdivision approval, that they “[had] met all qualifications of closing.” Thus, proper subdivision was the contractual responsibility of the Defendants.⁴²

2. Timely Notice of the Subdivision Problem

The Purchaser learned of the subdivision problem toward the end of May 2004 but never actually informed the Defendants or their attorney of the difficulty until the middle of June. If the problem had been attacked when it was first recognized, there would have been sufficient time to secure the Town’s approval before the settlement date. With the delay, the problem could not be resolved in the time available before closing. The Defendants assert that the Purchaser intentionally procrastinated in reporting the problem in order to gain leverage in its efforts to extend the settlement date.⁴³ By attributing the delay to the Purchaser,

⁴² There are contravening arguments. First, the Agreement defines Parcels B and C as “being part of Tax Parcel No. 1-35-19.00-12.00.” Ordinarily, duly subdivided parcels, *i.e.*, those said to exist “legally,” are assigned individual tax parcel identification numbers. By referring to Parcels B and C as part of a parcel identified by a tax parcel number, one could conclude that Parcels B and C did not separately exist. Second, the Agreement (at § 3.1) generally provides that regulatory approval is the Purchaser’s responsibility. That provision, however, involves responsibility for approvals necessary “to allow for the full development of the real estate.” This suggests governmental approvals for the specific purposes intended by the Purchaser, an issue independent of whether the lands had been duly subdivided.

⁴³ One can understand the Defendants’ suspicions. The Purchaser had been seeking an extension since at least August 2003. The Defendants knew that the Purchaser was not interested in acquiring title until the sewer capacity problem had been resolved. That the Defendants’ suspicions were not unreasonable is confirmed by a strategy e-mail sent on December 23, 2003 by Perry to other investors in the Purchaser. Defs.’ Ex. 54. After reviewing the lack of sewer capacity and the prospect that it would not be available for at least two years, he set forth two

the Defendants argue that the Purchaser deprived them of the opportunity to solve the problem in time for closing and that this conduct supports the denial of equitable relief.

The Defendants' argument, although not without some appeal, fails because the trial record is clear and unrebutted: the Purchaser did attempt to inform the Defendants in a timely fashion. Hershman placed repeated phone calls to Moore; he did not return them promptly. Had he done so, he and his clients, the Defendants, would have received timely notice. Moore's failure to return phone calls cannot be held against the Purchaser.⁴⁴

3. Location of the Access Easement

The Agreement entitles the Defendants to an easement over Parcels B and C for adequate access to their retained Parcel A for commercial use.⁴⁵ Although a few conceptual proposals had been set forth by the Purchaser, no agreement had been reached as to the location of the easement. The Defendants contend that the

options: "Either complete closing and take the risk that sewer service will become available within the near future or file against the Seller [Ruhl] for misrepresentation [as to sewer availability] in the hopes that the lawsuit will stay her attempts to sell the property to another buyer."

⁴⁴ There were, of course, other means of communication available to the Purchaser—in writing or through phone calls to Jones or the Defendants directly. In light of the complexity of the subdivision issue, lawyer-to-lawyer communication was the better approach and the telephone was a reasonable means.

⁴⁵ Although the Agreement refers to access over Parcels B and C, as a practical matter, that access would be over Parcel B.

failure of the Purchaser to delineate the easement in advance of settlement excused them from performance under the Agreement. The Purchaser acknowledges, as it must, an obligation to provide the easement.⁴⁶ It contends, however, that there is no requirement that the easement be established in advance of closing.

The Agreement does not expressly resolve the question of when must the easement be established. It contemplated that a “record plan” would be recorded before settlement, and, presumably, the record plan would show the easement. As noted above, however, the parties realized early on that the settlement date would arrive well before any record plan could be recorded because of the lack of sewer capacity. Otherwise, nothing in the Agreement suggested a date as to when the easement would actually be delineated. “[W]here no time for performance is fixed, the Court will imply a reasonable time for performance.”⁴⁷

Determining the location of the easement before closing would have conferred several benefits. First, it would have eliminated uncertainty and the risk of disputes after closing. Second, it would have avoided the potential for adversary interaction with subsequent owners or lenders.

⁴⁶ The Purchaser also notes that its obligation is merely to provide an easement “adequate” for the Defendants’ anticipated commercial use of Parcel A. There is no requirement that it first secure the Defendants’ approval. Indeed, the Defendants would be required to accept an easement which they did not like as long as the easement satisfied the contractual standard.

⁴⁷ See *Estate of Rigby v. Walls*, 1994 WL 728843, at *6 (Del. Ch. Nov. 9, 1994) (citing *Martin v. Star Publ’g Co.*, 126 A.2d 238 (Del. 1956)).

On the other hand, reserving the right to the easement in the deed would have sufficed. Any lien would have been subordinate to the recorded easement. The Purchaser, and any successor in interest, would have remained under precisely the same duty. Moreover, an easement may be reserved generally.⁴⁸ Also, the easement, as long as it was adequate for commercial purposes, could be located in a manner that would cause the least disruption to the servient tenant. Indeed, the fee owner, in general, may relocate the easement as long as it does not impair or burden the easement's use.

In addition, Parcel A was occupied and had highway access. It likely would have lost that access when a separate entrance was opened for the shopping center planned by the Purchaser. Until that happened, however, there was no distinct need for the easement. There also was the possibility, although an unlikely one, that highway access for Parcel A on its own could have been achieved. In short, there was no current (*i.e.*, as of the time of closing) reason for the easement to be established. As long as the easement was designated (and the necessary improvements implemented) by the time that it would be the only feasible access for Parcel A, the Defendants would have received the full benefit of their bargain. Accordingly, under the Agreement, the most reasonable time for delineating the

⁴⁸ See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.8 (2000).

easement would be during the time when access to Parcels B and C for the shopping center was established, a time well after closing. It, therefore, follows that the Purchaser was not obligated to locate precisely the easement before closing.⁴⁹

4. Unfulfilled Conditions and the Agreement's "Null and Void" Provision

By Section 4.5 of the Agreement, “[i]f, at the end of any and all extension periods the conditions of Section 3 have not been satisfied, this agreement shall be considered null and void. . . .” As of July 20, 2004, none of the conditions of Section 3 (which bears the heading “Conditions Precedent to Purchaser’s Obligation”)⁵⁰ had been satisfied. Section 3 focuses on regulatory approvals, including the recording of the record plan. Because of the lack of sewer capacity in the near term, even as the settlement date approached, the Purchaser had made little progress in its effort to secure regulatory approvals.

Moore had insisted upon including this provision in the Agreement and the Defendants now ask that it be ascribed its literal meaning: all regulatory approvals

⁴⁹ The Defendants’ attorney, in his letter of July 19, 2004, immediately before the scheduled closing, wrote, “the deed should reflect the right of way to Parcel A as set forth in paragraph 1.1 of the agreement.” Whether the intent of the author was (a) that a metes and bounds description of the easement to benefit Parcel A was to be included in the deed or (b) that simply a recitation of the language describing the access right in the agreement would suffice (*i.e.*, that it would be adequate for commercial purposes) can be fairly debated. Certainly, quoting the language of the Agreement would have satisfied, at least technically, his request.

⁵⁰ The Agreement does not contain any language to the effect that headings are for convenience only and not a substantive interpretive tool.

were not obtained before the settlement date; the Agreement required that regulatory approvals be obtained (not something that Purchaser could waive); it follows, so they argue, that the Agreement became null and void as of July 20, 2004.

That argument, which in a different setting with the same contractual language might have prevailed, cannot survive the Defendants' conduct. They knew, at least by the summer of 2003, that regulatory approvals would not be forthcoming within the timeframe established by the Agreement for settlement. Yet, they never objected. The Purchaser, by committing in January 2004 to settle in July 2004, may have waived the conditions precedent to its performance, but the Defendants did not decline the waiver. Finally, and perhaps most significantly, Ellis, in his letter of July 19, 2004, having no basis for believing that the record plan had been filed or would be filed by the next day, made no mention of it in his letter demanding settlement. Against this backdrop, the Defendants cannot invoke Section 4.5 of the Agreement to escape their contractual obligation.

5. The Town Code as Requiring the Purchaser to Obtain Subdivision Approval

The Defendants argue that the Town Code imposes upon purchasers of to-be-subdivided property the duty to complete the subdivision process. Frequently, the purchaser undertakes that responsibility because the purchaser wants to assure

that the result satisfies its requirements or because the seller is unwilling to incur the expense or lacks the expertise. There is, however, nothing in the Town Code that would preclude buyers and sellers from allocating the subdivision function to the sellers. Moreover, this debate misses the point for purposes of the present dispute. The parties entered into the Agreement with the misunderstanding, attributable to Ruhl, that the subdivision had been properly accomplished. They went forward on that basis; thus, by their own statements and conduct, subdivision was the responsibility of the Defendants, even in the absence of an express assignment of the role.

6. Consequences of the Purchaser's Delay

The Purchaser dawdled in its effort to study the site and to prepare the plans necessary to develop its project. During its more than two years of feasibility study and the final six months leading up to the proposed settlement date, the Purchaser accomplished relatively little. It had discussions with the Town about sewer capacity and general project concepts; some environmental assessment was accomplished; it held preliminary discussions with Delaware's Department of Transportation about highway access; and it had title work done. Yet, the feasibility study period was for Purchaser's benefit, not the Defendants' benefit.⁵¹

⁵¹ The Agreement allowed, but did not require, the Purchaser to engage in due diligence. *See* JX 1 at § 5.

The Purchaser identified a critical—and, in the short term, insurmountable—obstacle to implementation of its plans—sewer capacity. That discovery slowed down its efforts. The Purchaser, however, decided to go forward with completion of the transaction—in effect, accepting the risks attendant to, perhaps, an insufficient due diligence effort. One impediment to closing from the Purchaser’s perspective was its learning of the absence of subdivision approval. That, however, would not have interfered with the closing date if the Defendants (or, perhaps, more accurately, their attorney) had responded to the Purchaser’s initial attempt to convey information regarding the status of the subdivision. At that time, it was still possible to complete the subdivision effort before the scheduled closing. Thus, although the feasibility study may be viewed as having achieved much less than it should (or could) have accomplished, the simple fact is that the Purchaser’s conduct was not the cause of the confusion associated with the lack of subdivision approval as settlement approached.⁵²

7. Purchaser’s Ability to Close

The Defendants have contended that the Purchaser was not ready to settle and, thus, is not entitled to specific performance. They have questioned, for example, whether the necessary funds were available and whether the documents

⁵² Obviously, if the Purchaser’s exploratory work had uncovered the subdivision problems sooner, then the remedy could have been implemented at a more leisurely pace. That it might have been easier with earlier discovery does not support the inference that the Purchaser’s conduct was a cause of (or even materially contributed) the timing problem.

required to complete settlement had been prepared. The Court, as a factual matter, has found that the Purchaser could have obtained the necessary funds in a timely manner and that its attorney would have arranged for the performance of all those tasks essential to completion of substantial commercial real estate closing.⁵³

8. Purchaser's Insistence that Defendants Deliver Good Title

The Defendants contend that the Purchaser improperly conditioned its willingness to close on title issues; they assert that the Purchaser conflated title and subdivision concerns and, thus, are precluded from obtaining specific performance.

The principal title issue traces back to a plan to build a residential community to be known as Evergreen Lawns Addition. Streets were laid out more than 80 years ago over a portion of the Ruhl tract and, without going into detail, it turns out that Ruhl did not own the interior roadbeds. Although clearly a title defect, it would have been relatively easy to cure through a quiet title action. The Purchaser now asserts that the title questions are not pertinent because any objection to title was waived.⁵⁴ The lender of the funds for the acquisition of Parcels B and C and the title company committing to insure that mortgage were content to go to closing, despite the title problems, and the Purchaser maintains that it was also willing to accept the minimal title risks.

⁵³ See Part I *supra*.

⁵⁴ See Trial Tr. at 20-26 (July 5, 2005).

The correspondence sent by Hershman in the days leading up to the proposed closing on July 20, 2004, is not so clear. For example, on July 14, 2004, he wrote to the Defendants' attorneys:

[T]he prior subdivision plan [for Evergreen Lawns Addition To Georgetown] includes a roadway labeled Laurel Street which runs from Route 113 parallel to Route 9 through the lots within the subdivision. This street, however, has not been included in the legal descriptions in any of the deeds in the chain of title. Thus, there is a defect in the underlying title to the property which needs to be resolved, most likely by a quiet title action.⁵⁵

This, of course, may be read as notice of a title defect⁵⁶ and imposition on the Defendants by the Purchaser of the obligation to cure the defect, most likely by a

⁵⁵ Pl.'s Ex. 32. Furthermore, Perry's letter to Ruhl and Blanton on the same day referred to "other concerns about title" and informed them that the title issues had been "sufficiently described" in Hershman's letter to Ellis and Moore. Pl.'s Ex. 30.

⁵⁶ In addition, the next day, July 15, 2004, Hershman, in a letter to the Defendants' attorneys, wrote "[i]n follow-up to my July 14, 2004 letter, I would like to raise one additional title defect which arises from the recently recorded subdivision plan." Pl.'s Ex. 33. This problem arose out of a land swap between Ruhl and the owner of the gasoline station parcel at the corner. After the 1997 subdivision plot was prepared, the adjacent owners agreed to adjust their common boundaries. The 1997 plot formed the basis for the Agreement. Thus, a very small part of the land that Ruhl agreed to sell was not owned by her at that time. Of course, she also held an additional equally small area that she had acquired through the land swap. This does not seem to have been a significant concern to anyone. The Purchaser, with respect to the land swap area, would have been content with what Ruhl owned. The problem was further complicated by the deed of December 2003 from Ruhl to herself and her daughters which failed to account for the land swap. It is not clear that a material title defect even existed because Ruhl and her daughters could have collectively transferred title to the parcel which Ruhl was selling under the Agreement. In short, Ruhl did not convey to herself and her daughters the lands which she acquired from the land swap. As long as she executed the deed, she would have been able to convey whatever interest she held in that small parcel, an interest that constituted all of it. The point here is not the scope or sufficiency of a title defect associated with a land swap. It is, instead, that Hershman was addressing title defects. Why one would address title defects when title defects, as the Purchaser now contends, had been waived, is something of mystery. That the title defects were important to the Purchaser at this point is confirmed by the final two sentences of Hershman's letter: "I believe you now have an accounting of all of the open title issues in this matter. I await your call regarding reaching consensus on the resolution of these issues."

quiet title action, before closing could occur.⁵⁷ Moreover, on the day before the scheduled closing, Hershman wrote, with respect to the scheduling of closing, that the Purchaser “expect[ed] that you [the Defendants] will be able to deliver good, marketable title to the property, lawfully subdivided.”⁵⁸ Thus, he insisted that the Defendants provide good title, not merely convey a parcel that had been properly subdivided. These are not words typically chosen by a party waiving title defects.

The evidence of waiver of title defects by the Purchaser is sparse. The Purchaser’s attorney was neither clear nor precise when asked at trial if the title issue had been waived. His response was along the lines of, “I believe we did.” He did not recall when or how the waiver was communicated to the Defendants or their attorneys.⁵⁹

It is thus appropriate to measure the title question against the terms of the Agreement, which established a formal process for raising and resolving title issues. In particular, the Agreement, at Section 7, provides, in part:

Title to the property shall be good, marketable, fee simple, record title, free and clear of all liens and encumbrances. . . . Prior to closing Purchaser shall notify Seller of any liens, encumbrances, title

⁵⁷ Clearly, a quiet title action could not have been brought and concluded in less than one week.

⁵⁸ Pl.’s Ex. 34.

⁵⁹ Hershman testified by telephone; assessing testimony provided in that fashion is, of course, more difficult than considering in-court testimony. The extent of a court’s reliance on testimony is the product of many factors, including the witness’s ability to understand and recall the events; the witness’s ability to communicate; and the witness’s honesty. Here, there is no question about Hershman’s honesty or his ability to understand or to communicate. His recall, however, came across as uncertain. Thus, the Court is called upon to weigh, as to waiver of title defects, somewhat equivocal testimony against a reasonably clear (and contemporaneous) paper trail.

defects or other title objections. Within ten (10) days following Purchaser's notice, Seller shall notify Purchaser that Seller elects (i) to cure or remove such matters or (ii) not to cure or remove such matters, Failure of Seller to provide any notice shall be deemed to be an election not to cure or remove those matters.

If Seller elects or is deemed to have elected not to cure or remove those matters, Purchaser may elect, by notice to Seller within ten (10) days thereafter, (i) to accept title to the Real Estate subject to such matters, with no abatement of the Purchase Price . . . , or (ii) to terminate this Agreement, in which this Agreement shall be null and void

The actions of the parties fit within the construct established by the Agreement for addressing title concerns, even though it is not clear that the parties were focused on (or even cognizant of) the Agreement's terms. Hershman's letter of July 14, 2004, with its admonition that a quiet title action would be necessary to cure the Evergreen Lawns roadbed title defect, constituted notice of a title defect.⁶⁰ Although the Defendants never squarely replied to such notice, they insisted (through their realtor), after receipt of the letter, that closing occur as scheduled (and thus with no opportunity to address the defect). That insistence may only reasonably be construed as conveying the Defendants' decision that they were not going to exercise their right to cure the title defect. When Hershman responded with the requirement that, for settlement to go forward, the title must be good, the Purchaser is fairly viewed as having refused to accept the then-imperfect state of

⁶⁰ This view is supported by the July 15, 2004 letter. *See* Pl.'s Ex. 33.

the title. With this finding, it follows, under the Agreement, that the Purchaser (perhaps inadvertently) effectively terminated the Agreement with its attorney's letter of July 19, 2004.⁶¹

The Purchaser, perhaps because it did not consider the question of whether its waiver of title objections was seriously in debate, has not addressed the consequences, as such, of a conclusion that there was no waiver of title defects. The Purchaser, however, advances the position that it does not matter because of Ruhl's breach of the Agreement from the inception, based upon her inaccurate representations regarding the status of the subdivision. That, in the Purchaser's estimation, is the paramount consideration: there was no need to assert title concerns because, regardless of the quality of the Defendants' title, they could not close because they could not lawfully convey the not-yet-subdivided parcel. If Hershman had merely insisted upon the Defendants' compliance with the subdivision obligation, its argument would be persuasive. Hershman, however, did

⁶¹ On July 20, 2004, one of Ellis's colleagues wrote to Hershman and took the position that the Purchaser had breached the Agreement. Pl.'s Ex. 36. He contended that the July 15, 2004 letter raising a title issue was ineffective because it was raised less than ten days before the mandatory settlement date. He perceived that letter—not without some cause—as an effort to obtain an extension of time to settle. On behalf of the Defendants he was right to invoke the Agreement, even if he did raise it for the wrong issue. The Agreement allows the raising of title defects “[p]rior to closing.” Thus, the Agreement is best read as allowing the Purchaser to give notice of a title defect even the day before the settlement date. That would have the effect of extending the contract by the ten-day period granted the sellers to determine whether or not to cure the title defect. In this instance, the Defendants did not take the ten days allowed; instead, they promptly made clear their insistence that settlement must occur on July 20, 2004, thereby demonstrating that they would not be seeking to cure the title defect.

more—on behalf of the Purchaser, he insisted upon “good, marketable title.” He did not have to do so, especially if the Purchaser, as it now contends, really intended to waive title defects, but he did. The trial record, notwithstanding Hershman’s testimony, does not support the finding that the Purchaser in fact either waived title objections or communicated that waiver to the Defendants (or their attorneys).

Instead, on behalf of the Purchaser, he gave notice of one or more title defects; the Defendants responded by insisting on closing without curing the title defect; Hershman, in turn, informed the Defendants that they must provide good title, or, in the terms of the Agreement, that the Purchaser was not willing to take title as it then existed. All of this occurred before the settlement date of July 20, 2004. Thus, by the date of closing scheduled under the Agreement, the Purchaser had already terminated the Agreement by its conduct under the expressly agreed upon procedures for resolving title defects.⁶² With that conclusion, the Purchaser must be deemed to have given up its right to insist upon closing and, accordingly, it has not met its burden of demonstrating entitlement to a decree of specific performance.

⁶² This reflects the “interpretive primacy of giving effect to the parties’ intention as expressed by the written words of their agreement[.]” *Rohe v. Reliance Training Network, Inc.*, 2000 WL 1038190, at *8 (Del. Ch. July 21, 2000).

IV. Conclusion

For the foregoing reasons, the Purchaser's application for a decree of specific performance is denied. An implementing order will be entered.