

Washington's Court of Appeals, Division II, recently addressed an all too common problem: the buyer sought to be excused from his remaining payments to the seller for a property when unanticipated passage of wetlands legislation frustrated the buyer's plan to develop the property. Felt v. McCarthy, 78 Wn.App. 362 (1995). The court held that the doctrine of supervening frustration offers no help to the buyer when the seller has completely performed and the fulfillment of the buyer's development was not a basic assumption on which the seller entered into the contract.

The Washington Supreme Court has adopted the doctrine of supervening frustration, as follows:

"Where, after a contract is made, a party's principle purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary."

The fair market value of the property after the loss of development potential was \$50,000.00 - a substantial drop from the \$310,000.00 that the buyer agreed to pay. However, the court stated that a decrease in the value of the property and the loss of potential profit are by themselves insufficient to justify relief. "The frustration must be so severe that it is not fairly to be regarded as within the risks that the affected party assumed under the contract."

Courts have held that the contract must expressly allocate risk to the seller; otherwise a purchaser of real property assumes the risk that regulations may change.

In this case the evidence was undisputed that the wetlands legislation came as a complete surprise to everyone.

Whether the specific frustrating event was unforeseeable is not the court's worry. "The more fundamental inquiry is whether the assumed possibility of a desired object or effect to be obtained by either party forms the basis on which both parties enter into it. The object must be so completely the basis of the contract that, as both parties understand, without it their transaction would make little sense."

The court held that the present transaction made sense to the seller without regard to the buyer's eventual success or failure.

The lesson for developers is to make sales contingent, as much as possible.