

FILED

MAR 11 1997

PAT GUTZEIT, CLERK
BOONE CIRCUIT/DISTRICT COURTS
BY: _____ D.C.

IN THE COMMONWEALTH OF KENTUCKY
BOONE COUNTY CIRCUIT COURT

SUSAN WERNER
61 Brittany Lane
Fairfield, Ohio 45014

CASE NO. 97-CI-00253

and

JUSTIN WERNER
61 Brittany Lane
Fairfield, Ohio 45014

COMPLAINT FOR
DECLARATORY JUDGMENT

Plaintiffs,

vs.

FINKE HOMES, INC.
3180 Burlington Pike
Burlington, Kentucky 41005

Defendant.

Now come Plaintiffs, by and through counsel, and state as follows:

1. Defendant, Finke Homes, Inc., is a Kentucky corporation with a principal place of business located at 3180 Burlington Pike, Burlington, Kentucky 41005.
2. Plaintiffs, Susan Werner (nee Hall) and Justin Werner are individuals, husband and wife, who, at all times, relevant herein resided in the State of Kentucky.
3. On or about April 19, 1996 the parties entered into a Sales Agreement. The Agreement, attached hereto as Exhibit "A", is a preprinted form Agreement prepared by Defendant.
4. Pursuant to the terms of the Agreement, Defendant promised to build a home on Lot #30 in the Cardinal Cove Subdivision in Burlington, Kentucky and

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Attorneys at Law
318 West Fourth Street
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conveyed a lot and home to the Werners for the sum of One Hundred Twenty-Six Thousand Seven Hundred Sixty Dollars (\$126,760).

5. The construction by the seller was to be completed within one hundred twenty (120) days from the date of excavation (Exhibit "A", paragraph 5) and the closing was to be not earlier than September 20, 1996. (Exhibit "A", paragraph 3).
6. The parties agreed that time was of the essence in the contract. (Exhibit "A", paragraph 14).
7. Plaintiffs complied with all terms and conditions of the contract by making a One Thousand Dollar (\$1,000) deposit on April 20, 1996, and a Five Thousand Three Hundred Dollar (\$5,300) additional deposit on July 18, 1996.
8. Excavation on Lot #30 began on August 1, 1996.
9. As of January 30, 1997, the home has not been completed.
10. Under the terms of the contract, the house should have been completed not later than December 1, 1996. (Exhibit "A", paragraphs 5 and 14).
11. On or about December 11, 1996, Plaintiffs contacted Defendant, by letter, concerning the construction delays, the scheduling of a closing and construction errors that had occurred.
12. The Defendant did not respond.
13. On January 2, 1997, Plaintiffs notified Defendant that Defendant was in default under the contract, gave notice of termination of the contract and demanded refund of their deposits totaling Six Thousand Three Hundred Dollars (\$6,300).
14. The Defendant did not respond.
15. On January 21, 1997, the Plaintiffs, by facsimile, ordinary mail and certified mail demanded full refund of their deposits.
16. The Defendant did not respond.
17. On or about February 10, 1997, Plaintiffs received a letter dated February 4, 1997 with a date of mailing of February 7, 1997 indicating that the home would be ready for a final walk-thru on February 18, 1997. Plaintiffs were also

advised that if they did not schedule the walk-thru and if they refused to close then Finke Homes would consider them in default of the contract and retain all monies paid. (Copy attached as Exhibit "B").

WHEREFORE, Plaintiffs demand that this Court finds that the Defendant has breached the Sales Agreement of April 19, 1997, and order Defendant to refund Plaintiffs all deposits totaling Six Thousand Three Hundred Dollars (\$6,300) plus interest. Plaintiffs also demand that Defendant be ordered to pay costs, expenses and fees including attorney fees incurred herein.

Respectfully submitted,

FLANAGAN, LIEBERMAN, HOFFMAN & SWAIM



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Finke Homes, Inc.

3180 Burlington Pike
Burlington, KY 41005
(606) 586-7583

EXHIBIT
"A"

RECORD - BAYONNE, NJ

A Kentucky Corporation

FINKE H O M E S

SALES AGREEMENT

AGREEMENT between Burlington Estates, Inc., hereinafter called "Seller" and

Susan L. Hall & Justin J. Werner
of 16182 White Oak #94 Florence
Ky 41042 hereinafter called "Buyer"

1. **Terms of Agreement.** For the considerations hereinafter set forth, Seller agrees to sell and convey and Buyer agrees to purchase, upon the terms and conditions set forth

in this Agreement, (a) the land described as follows: Lot # 30

Block # Subdivision Cardinal Cove

as recorded on a plat filed among the records of

County, State of KY, in Plat Book , Page ,
together with (b) a home to be built thereon by Seller according to

Seller's Heritage A
Series A Plan, Set 1000 Alternate A

in a workmanlike manner substantially in accordance with plans and specifications which have been reviewed by Buyer (collectively called "property").

Model homes, if any, and any advertising or promotional materials used or displayed by Seller are for display purposes only and are not the basis of the bargain between Seller and Buyer. The obligations of Seller under this Agreement shall be determined solely by reference to the plans and specifications (referred to above) and the terms of this Agreement.

2. **Sales Price and Schedule of Payments.** The price of the house and lot including all

optional items listed below is \$267,760

The sales price is payable as follows:

- (a) Cash earnest money due upon signing of this Agreement the receipt of which is hereby acknowledged \$1,000
- (b) Additional cash payment on or before five days after receipt of loan approval \$5,300
- (c) Other
- (d) Balance due upon settlement to be paid by a cashier's check or a check from a title company approved by Seller \$20,460

3. **Optional Items:** Optional items included in the sales price are:

Contingent upon Buyer obtaining financing with agents help

1895 Cardinal Way, Florence
Ky 41048

home not to close prior to Sept 20, 1996

All additional extras must be evidenced in writing.

4. **Prerequisites to Construction.** Construction by Seller shall begin as soon as possible after receipt by Seller of:

- (a) Cash payments called for in 2(a) and (b) above within the time provided;
 - (b) Selection sheets completed and signed by Buyer within 7 days on forms furnished by Seller;
 - (c) Written mortgage commitment within 30 days by a lending institution for a mortgage loan secured by the property in the amount necessary to complete payment at settlement, or other evidence satisfactory to Seller of Buyer's ability to complete payment at settlement;
 - (d) Written approval of plans and specifications within 30 days by the Buyer.
 - (e) All necessary government approvals and permits, if any, within 30 days.
- Buyer shall provide items (a), (b) and (c). Seller and Buyer will cooperate in obtaining items (d) and (e).

5. **Schedule of Construction.** Construction by Seller shall be completed in accordance with Paragraph 1 and settlement shall take place in accordance with Paragraph 8 on or before one hundred twenty (120) days after commencement of construction, with

completion expected on or around 120 days from excavation

shall be provided by Seller. Seller agrees that such uncompleted items shall be completed as soon as weather conditions permit.

- (c) Any items determined to require corrective action as a result of the Pre-settlement inspection conducted by Seller and Buyer will be completed as soon as is practical, but is not cause for delaying settlement if all other conditions of this contract have been fulfilled.
- (d) In the event that Seller is unable to obtain the materials specified on the plans or specifications or the items shown on the selection sheets through reasonable sources of supply, Seller shall have the right to substitute materials of similar pattern and design and substantially equivalent quality.
- (e) The location and ground elevation of the home on the lot and the necessity, if any, to reverse the plan of the home to conform to the existing lot contours are to be determined by Seller at its sole discretion.
- (f) Seller may remove such trees from the lot as it deems necessary to construct the home and it shall not be responsible for any damage to or destruction of remaining trees during or resulting from the process of construction.
- (g) Seller reserves the right to make changes in plans and specifications solely for the purposes of mechanical installations, building code requirements, and normal architectural design improvements subsequent to the date of this Agreement.

6. **Closing Costs/Settlement Charges/Prepays.** All closing costs/settlement charges including but not limited to all conveyance fees, transfer taxes, recording fees, prepaid items (including but not limited to mortgage insurance premiums, prepaid fire and hazard insurance premiums, prepaid real estate taxes, and prepaid interest on the mortgage), and all other lender-required fees and charges shall be paid by Buyer, except the following items, if any, to be paid by Seller:

2% of loan amount to be paid towards closing costs or rate buy down

7. **Settlement.** After completion of construction in accordance with this Agreement settlement shall take place on a date and at a place to be selected by Seller on not less than ten (10) days notice to Buyer. Upon payment by Buyer of the balance due Seller and expenses of settlement and all proper fees and charges in connection with it, Seller shall convey the property to Buyer by general warranty deed, title to be good and marketable, free of liens, encumbrances, easements (except for utility easements and any other easements which may be observed by an inspection of the property, assessments, and restrictions running with the land and common to the subdivision). Possession shall be given to Buyer when Seller receives the balance of the purchase price and, prior thereto, Buyer shall have no right to enter upon or occupy the property without the written approval of Seller. In the event that Buyer refuses to settle at the date specified by Seller in accordance with this paragraph, Seller may, at its option, hold the Buyer in default under paragraph 9, or Seller may elect, at its discretion, to extend the time for settlement for successive periods of 30 days beyond the previously established date, provided that Buyer pays to Seller a fee of 1% of the sales price in advance for each such 30 day extension. Should Buyer not settle within an extension period, Buyer shall be in default of this Agreement under paragraph 9.

8. **Cancellation by Seller.** In the event items 4(d) and 4(e) cannot be obtained in thirty days or in the event that Seller shall determine, in good faith, and for reasons beyond its control, including any cause specified in Paragraph 5(a) and including any pending or declared governmental moratorium, that the home purchased hereunder cannot be completed and made available for occupancy prior to the time provided for settlement hereunder or within a reasonable time thereafter, or if Seller shall be unable to deliver good and marketable title to the property, this Agreement may be cancelled at the option of the Seller, upon ten (10) days written notice to Buyer. In the event of cancellation as provided for in this paragraph, Seller's liability shall be limited to the return of all monies paid hereunder by Buyer, and upon such return, this Agreement shall be null and void and Seller shall be released from all obligations hereunder.

9. **Default by Buyer.** Default by Buyer shall be deemed to have occurred upon Buyer's failure (a) to make all cash payments on or before the dates specified herein (b) to provide items 4 (b) and 4(c) on the times specified (c) on the date appointed, to lender at settlement the amounts called for herein and accept title, or (d) to comply with any other terms of this Agreement. In the event of Buyer's default under this Agreement, Buyer agrees that all sums of money paid hereunder prior to such default shall be retained by Seller as liquidated damages, or in the alternative, Seller may seek specific performance of this Agreement or any part thereof in any court of competent jurisdiction.

10. **Covenants and Easements.** The property purchased hereunder and certain other property in the area hereof may be subjected to certain restrictive covenants, agreements, charges and restrictions as contained in or provided for in certain instruments recorded among the land records of Florence County, Without limit any provision hereof, Buyer accepts title to the property subject to the matters identified and to any other similar provisions contained in instruments recorded among the appropriate land records prior to the transfer of title hereunder.

11. This Agreement shall be binding on the parties and their heirs, legal representatives and assigns.

12. This is the complete Agreement between the parties. There are no written or oral agreements or understandings directly or indirectly connected with this Agreement that are not incorporated herein unless they are put in writing, signed by the party and attached hereto.

13. **Assignment.** Buyer's interest and obligation hereunder shall not be assigned without written consent of Seller.

14. **TIME IS OF THE ESSENCE OF THIS AGREEMENT. THIS IS A LEGAL BINDING CONTRACT. READ AND UNDERSTAND ALL PROVISIONS PRIOR TO SIGNING. IF NOT UNDERSTOOD, SEEK LEGAL OR OTHER COMPETENT ADVICE.**

IN WITNESS WHEREOF, the parties have executed and delivered this Agreement

the 19 day of April, 1996

(a) In the event of delays resulting from any of the following causes, the time for completion of construction shall be extended for a period of time equal to the length of the delay, and Seller shall not be liable for any failure or delay in construction caused by:

- (1) Acts or default of Buyer.
- (2) Acts or defaults of any developer or contractor engaged in constructing or installing streets or utilities.
- (3) Adverse weather conditions.
- (4) Damage caused by fire, storm, earthquake or other casualty.
- (5) Strike, lockout, or other labor trouble of any kind.
- (6) Governmental controls, procedures, regulations, restrictions or moratoriums.
- (7) Allocation of labor supplies or material by or under the authority of any government or government agency.
- (8) Acts of subcontractors or their employees.
- (9) Acts of suppliers of labor or material.

(b) In the event that on the settlement date scheduled in accordance with this Agreement the home shall be otherwise habitable, but such items as landscaping, exterior concrete, driveways, final grading and exterior painting cannot be completed by reason of weather conditions, settlement shall be consummated on the date so scheduled so long as temporary access to the property

Witness _____

Witness _____

Witness _____

Buyer *[Signature]*

Buyer * *[Signature]*

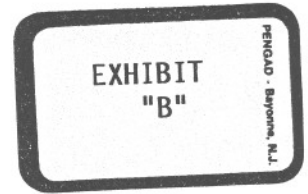
FINKE HOMES, INC.

By *[Signature]*

Vice President

By _____

Asst. Secretary



February 4, 1997

TO: Justin and Susan Werner
6182 White Oak #94
Florence, KY 41042

RE: New Home at Lot 30
Cardinal Cove Subdivision

Dear Justin and Susan,

Your new home at Lot 30 Cardinal Cove is nearing completion. This home is able to be closed by the end of February. It is unfortunate that there have been delays due to weather and labor availability and performance. Your completed home will be of highest quality and workmanship.

I have received letters stating that you want to terminate your contract. I understand your frustration with the length of time of construction and your concern about some framing construction errors. The framing errors were corrected in a professional manner. It would be a shame to not close on the house at this point.

Your new home will be ready for a final walk thru on February 18th . It is important for you to do this walk thru to prepare for closing. Should you not contact us to do this walk thru and refuse to close, then Finke Homes will consider you in default of your contract and retain all monies paid by you in accordance with paragraph 9(d) of your contract. If you have any questions about this please call me at 586-7583.

Sincerely,

A handwritten signature in cursive script that reads 'Ted Seiter'.

Ted Seiter,
Vice President

FILED

MAR 31 1997

SUSAN WERNER, et al

PLAINTIFFS

v.

FINKE HOMES, INC.

PAT GUTZEIT, CLERK
BOONE CIRCUIT COURT, DIST. COURTS
BY: CR D.C.

DEFENDANT

ANSWER

Comes now the Defendant, FINKE HOMES, INC., by and through Counsel, and for its Answer to Plaintiffs' Complaint filed herein, respectfully state as follows:

FIRST DEFENSE

1. Plaintiffs' Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

2. That this answering Defendant admits the allegations contained in paragraphs 1, 2, 3, 4, 6, 7, 8, 9, 11, 13, 15 and 17, of the Complaint filed herein.

3. That this answering Defendant denies the allegations contained in paragraphs 5, 10, 12, 14 and 16 of the Complaint filed herein.

Respectfully submitted,

ADAMS, BROOKING, STEPNER,
WOLTERMANN & DUSING
8100 Burlington Pike
P.O. Box 576
Florence, Kentucky 41042



JAMES G. WOLTERMANN

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 1997, a true and correct copy of the foregoing was mailed, by regular U.S. Mail, postage pre-paid to the following counsel: David L. Hall, Attorney for Plaintiffs, 318 West Fourth Street, Dayton, Ohio 45402.



JAMES G. WOLTERMANN