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Case No. 89332-2

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THE SUPREME COURT OF THE
STATE OF WASHINGTON

In the Matter of

KHUSHDEV MANGAT and HARBHAJAN MANGAT, and the Marital Community composed thereof,

Petitioners

v.

SNOHOMISH COUNTY, a political subdivision of the State of Washington; LUIGI GALLO, a single man, and JOHANNES DANKERS and MARTHA DANKERS, and the Marital Community composed thereof,

Respondents

ANSWER OF RESPONDENTS GALLO AND DANKERS TO PETITION FOR REVIEW

SENT ON OCTOBER 21, 2013 VIA E-MAIL SUPREME@COURTS.WA.GOV FOR FILING IN THE SUPREME COURT OF THE STATE OF WASHINGTON.

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TABLE OF CONTENTS

I. IDENTITY OF RESPONDENTS.................... 1

II. STATEMENT OF THE CASE...................... 1

III. ARGUMENT.................................. 5

IV. CONCLUSION................................. 11

TABLE OF AUTHORITIES

CASES

Birnbaum v. Pierce County, 167 Wn. App. 728, 274 P.3d 1070, review denied, 175 Wn.2d 1018, 290 P.3d 94 (2012) 10

Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 306, 96 P.3d 957 (2004)........ 6

Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 296 P.3d 860 (2013) 7, 8, 9

Lauer v. Pierce County, 173 Wn.2d 242, 253-54, 267 P.3d 988 (2011) 6

Washington Statutes

RCW 4.84.370........ 10

RCW 36.70C.060(2) 7

RCW 64.40........ 4, 5, 10

RCW 64.40.030........ 10

Court Rules

RAP 13.4(b) 6, 11, 12

RAP 18.1........ 10

I. IDENTITY OF RESPONDENTS

Respondents Luigi Gallo (Gallo) and Johannes Dankers and Martha Dankers (Dankers) file this answer in response to the Petition for Discretionary Review filed by petitioners, Khushdev Mangat and Harbhajan Mangat (Mangats).

II. STATEMENT OF THE CASE

This case arises out of the failed attempt of the Mangats to acquire and subdivide approximately 40 acres of land owned by Gallo and Dankers. The Mangats entered purchase and sale agreements with Gallo and Dankers which allowed them up to 14 months to process an application for subdivision of the property and complete their purchase. The purchase agreements also contained a clause which provided that in the event the Mangats defaulted, they were to turn over to Gallo and Dankers all of the maps, plans, studies, reports and other documents prepared by their surveyors, engineers, consultants and other experts. The purpose of this clause was to put Gallo and Dankers in a position where they could complete the subdivision of their property in the event the Mangats exercised any of their rights to terminate the agreement or failed to complete the purchase. CP 629-631 (Declaration of Johannes Dankers).

By mutual agreement the closing date was extended to December 16, 2009. CP 196 (Declaration of Harbhajan Mangat p. 2) and CP 631 (Declaration of Johannes Dankers p. 3). However, the Mangats were

unable to secure financing they needed to purchase the property and failed to perform at closing. It is undisputed that the Mangats defaulted under the purchase and sale agreement with Gallo and Dankers. CP 631 (Declaration of Johannes Dankers).

In January, 2010, Mr. Gallo met with Snohomish County planners to arrange to complete the process of obtaining preliminary approval of the subdivision of the Gallo and Dankers land. Through their attorney, the Mangats raised objections with the County planners to the continuation of the subdivision of the Gallo and Dankers land on the grounds that the Mangats "owned" the application. The Snohomish County Prosecutor's Office wrote a reply to the Mangats' attorney explaining that the County viewed subdivision applications to be "in rem" and that since the Mangats no longer had an interest in the land, the request for the subdivision of the land would be processed at the direction of the property owners. CP 214-215 (Exhibit 2 to Declaration of Harbhajan Mangat). Over the next 12 months, Gallo and Dankers expended considerable sums on consultants and engineers to address outstanding issues raised by the County and to obtain recommendations from County staff that the proposed subdivision of their land be given preliminary approval. Three weeks before the hearing on preliminary approval of the subdivision, the Mangats filed a lawsuit in Snohomish County Superior Court requesting an injunction to enjoin Gallo and Dankers and the County from the further processing of

the application and, alternatively, for money damages against the County for the "taking" of their rights in the application without compensation. They alleged that they "owned" the application and that an injunction was necessary to stop the imminent injury to those property rights. In their petition in this case, the Mangats refer to this lawsuit for injunctive relief as *Mangat I.*

On May 3, 2010, the Mangats' motion for a preliminary injunction was heard by Honorable Robert Leach, judge pro tem, Judge Leach found that the Mangats had defaulted on their contract and by the terms of their contract were required to turn over to Gallo and Dankers the maps, drawings, plans, reports and other documents prepared by their engineers, surveyors, consultants and other experts and that, therefore, there were no remaining interests for the Mangats to own. He further found that an application to subdivide land is merely a request to the local jurisdiction to permit the subdivision which may trigger rules for vesting the property under existing zoning codes, but the application did not create a separate property interest apart from the land. Accordingly, Judge Leach found that the Mangats held no property interest which would be injured by the further processing of the application for the subdivision of the Gallo's and Dankers' land and denied the Mangats' motion for preliminary injunction.

On May 11, 2010, the hearing examiner conducted the hearing on the application for subdivision of the Gallo and Dankers' land. On May

17, 2010, the hearing examiner entered her decision granting preliminary approval of the subdivision of the Gallo and Dankers' land with conditions. CP 254-269 (Decision of Snohomish County Hearing Examiner). The Mangats appealed the hearing examiner's decision to the Snohomish County Council. Gallo and Dankers moved for dismissal of the appeal. On June 15, 2011, Snohomish County Council granted the motion and dismissed the appeal. CP 327-329 (County Council Dismissal). On July 5, 2010, the Mangats filed this action which included (1) an appeal of the hearing examiner's decision under the Land Use Petition Act (LUPA), (2) a request for a writ of mandamus, (3) request for a writ of prohibition and (4) a claim against the County for delay damages under Chapter 64.40 RCW. The County and Gallo and Dankers joined in a motion for summary judgment dismissing *Mangat I.* On August 17, 2011, Judge Kurtz granted the motion for summary judgment and dismissed *Mangat I.* The Mangats appealed Judge Kurtz's summary judgment to the Court of Appeals under Court of Appeals No. 68739-5-I.

On October 19, 2011, Judge Farris entered partial summary judgment dismissing the Mangats' appeal under LUPA and their claims for a writ of mandamus and a writ of prohibition. On April 12, 2012, Judge Bowden dismissed the Mangats' remaining claim for delay damages under Chapter 64.40 RCW. The Mangats then appealed the dismissal

orders entered by Judge Farris and Judge Bowden under Court of Appeals Cause No. 68739-5-I

The Court of Appeals denied the Mangats' motion to consolidate *Mangat I* with this case on appeal. However, the Court of Appeals assigned both cases to the same panel and the two cases were "linked" for oral argument. The Court of Appeals issued its published opinion in *Mangat I* affirming the trial court's orders of dismissal. The Mangats filed a petition for discretionary review of that decision which is pending under Supreme Court Cause No. 89378-1 The Court of Appeals issued a separate unpublished opinion in this action affirming the orders of dismissal entered by the trial court.

III. ARGUMENT

On appeal, this case involved three issues:

> (1) Were the Mangats' applications for writs of mandamus and prohibition barred by collateral estoppel?
> (2) Did the Mangats lack standing under LUPA to challenge the decisions of the hearing examiner and the County Council? and
> (3) Was Mangats' claim for damages under Chapter 64.40 RCW time barred?

None of these issues presented a question of constitutional law. The Court of Appeals decision on these issues did not conflict with any other decision of the Court of Appeals or the Supreme Court. The Court of Appeals applied well-established case law to answer these three questions in the affirmative and affirm the trial court's orders. The Court of Appeals

decision was a straight-forward analysis and application of the law to the particular facts of the case. The decision of the Court of Appeals resolved disputes between these particular parties, but did not involve any issue of substantial public interest. Thus, this case does not meet any of the criteria of RAP 13.4(b) for acceptance of discretionary review by the Supreme Court.

In seeking writs of mandamus and prohibition to essentially stop the County from further processing of the subdivision of the land owned by Gallo and Dankers, Mangats sought the same relief based on the same facts and arguments as they raised in their complaint for injunctive relief in *Mangat I.* The Court of Appeals applied the well-established doctrine of collateral estoppel, citing Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). The Court reviewed the four elements which must be established to apply the doctrine of collateral estoppel to bar an action and found that all four had been satisfied in this case. The court ruled that the summary judgment dismissal of the applications for writs of mandamus and prohibition was proper, since they were barred by collateral estoppel.

Similarly, the Court of Appeals reviewed the four conditions set forth in Lauer v. Pierce County, 173 Wn.2d 242, 253-54, 267 P.3d 988 (2011) to determine whether the Mangats were an "aggrieved or adversely affected" party entitled to standing under LUPA. The Mangats' LUPA petition specifically alleged that they had standing under RCW

36.70C.060(2) as persons "aggrieved or adversely affected" by the hearing examiner's decision. They did not allege and at no point before the trial court did they claim that they had standing as the property owner. Indeed, such an allegation would have been unsupported by and contrary to the declarations before the trial court. Thus, the issue squarely before the trial court and the Court of Appeals was whether the Mangats were persons "aggrieved and adversely affected" by the decisions of the hearing examiner and Snohomish County Council. It is undisputed that the Mangats owned no other property in the vicinity of the land being subdivided and made no showing of injury or prejudice at the hearing on preliminary approval of the subdivision of the subject parcel of land. As they had in their pleadings before the court in *Mangat I*, the Mangats alleged to the hearing examiner that they were the owners of the subject application. The Court of Appeals noted that this claim of ownership to the application had been decided against the Mangats in *Mangat I* and that in deciding whether to prove the plat application, the hearing examiner and County Council had no obligation to consider this claim of ownership. Thus, the Court of Appeals found that the conditions for establishing standing as a person "aggrieved and adversely affected" for purposes of LUPA were not present in this particular case.

In their petition, the Mangats assert that the Court of Appeals decision finding a lack of standing under LUPA is in conflict with the Supreme Court's decision in Lakey v. Puget Sound Energy, Inc., 176

Wn.2d 909, 296 P.3d 860 (2013). However, the petitioners misread Lakey. In Lakey, the plaintiffs brought a claim for damages for inverse condemnation, alleging that the issuance of a variance by the City of Kirkland to Puget Sound Energy led to the construction of a substation emitting electro-magnetic fields onto their properties and constituted the inverse condemnation of their property. The City asserted that the plaintiff's action for inverse condemnation was barred because the plaintiff's had not filed a LUPA action challenging the issuance of a variance. In addressing this defense, the Court held that LUPA could not be applied to bar the homeowners' inverse condemnation claims because the homeowners were only seeking compensation, rather than a reversal or modification of the land use decision. In Lakey, the Court specifically noted that the homeowners were making a claim "that they could not make before the hearing examiner". *Id at 927.* The Court cited the state statutes and municipal code establishing the jurisdiction of hearing examiners to make decisions on zoning matters, none of which referenced imminent domain or inverse condemnation. Since the hearing examiner did not have jurisdiction to decide a question of inverse condemnation, the Court reasoned that the homeowners were not invoking superior court's appellate jurisdiction under LUPA and held that LUPA did not apply to the homeowners' inverse condemnation claim. The claim was not, therefore, time barred. In this case, the Mangats did seek to invoke the court's appellate jurisdiction under LUPA. In order to invoke that

jurisdiction, the Mangats were required to show that they had standing under LUPA.

If anything, the Court's decision in Lakey supports the Court of Appeals decision in this case. The Court in Lakey examined the scope of the hearing examiner's jurisdiction and determined that deciding an inverse condemnation claim was not within that jurisdiction. In this case, the Court of Appeals also examined the scope of issues the hearing examiner and County Council were to decide in approving a subdivision application and determine that a resolution of any dispute between the Mangats and Gallo and Danker concerning property rights was not within their jurisdiction. Because the Mangats alleged claim was not an issue for the hearing examiner and County Council to consider in approving the subdivision, the Mangats were not an "aggrieved or adversely affected" party entitled to standing under LUPA. Like the homeowners' claim in Lakey, the Mangats alleged claim of ownership of the application against the interest of Gallo and Dankers was properly an issue within the jurisdiction of the superior court in *Mangat I.* The Mangats, in fact, brought that claim before the superior court and it was improper for them to expect that the issue could be decided by the hearing examiner or the Snohomish County Council. Thus, both the Court of Appeals decision in this case and Lakey have produced consistent outcomes, namely that actions for compensation or determination of issues outside the

jurisdiction of the hearing examiner are subject to general jurisdiction of the trial courts.

Finally, the Court of Appeals held that the Mangats delay damages claims under Chapter 64.40 RCW were time barred under RCW 64.40.030. The Court applied the principles in Birnbaum v. Pierce County, 167 Wn. App. 728, 274 P.3d 1070, review denied, 175 Wn.2d 1018, 290 P.3d 994 (2012) to conclude that the Mangats' claim should have been brought in 2008 and its suit filed in July, 2011 was time barred.

In deciding each of the three issues before it, the Court of Appeals applied the law to the particular facts of this case. If the Supreme Court were to review this case, it would be retracing the steps the Court of Appeals took to decide these three issues for these particular parties, based on the unique facts of this case. It would not be addressing any issues of constitutional law, nor would it address any issue of substantial public interest. The Court's review of this case would also not be needed to resolve any conflict between the Court of Appeals decision and any other decision by the Court of Appeals or the Supreme Court.

The Court of Appeals also granted the requests of Gallo and Dankers and the County for attorney fees under RAP 18.1 and RCW 4.84.370. The petition does not challenge this ruling. Gallo and Dankers submit that the award of attorney fees on appeal should also apply to their fees incurred in answer to the petition for discretionary review.

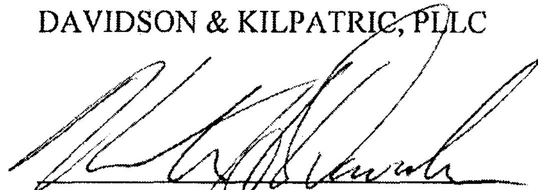
The closest the Mangats can come to justifying this case for review under RAP 13.4(b) is to argue that this case should be accepted for review because it is "linked" to *Mangat I*, which they claim raises issues of unconstitutional taking of their property interest. Even if there was an issue of constitutional law meriting review in *Mangat I*, there is no reason for the Court to also review this case, which does not meet the criteria of RAP 13.4(b). Should the Court find there are issues in *Mangat I* it should review, it can obviously accept review of that case without reviewing this case. However, as we have argued in our answer to the petition for discretionary review in *Mangat I*, *Mangat I* is also a case limited to the facts of this case and the consequences of a contractual default. It is also devoid of constitution law issues or issues of substantial public interest which should be addressed by the Court. Neither of these cases are worthy of the Supreme Court's time and attention and both have been properly decided by the Court of Appeals, applying well-established law to resolve claims arising out of the Mangats' breach of their contracts with Gallo and Dankers.

IV. CONCLUSION

None of the criteria in RAP 13.4(b) for acceptance of discretionary review by the Supreme Court are present in this case. Accordingly, a discretionary review should be denied.

Respectfully submitted this 21st day of October, 2013.

DAVIDSON & KILPATRIC, PLLC



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DECLARATION OF SERVICE

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I, Abigail A. Landes, declare under the penalty of perjury that I caused a true and correct copy of Answer of Respondents Gallo and Dankers To Petition For Review to be served, via e-mail and legal messenger, upon and addressed to the following individuals:

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I, Abigail A. Landes, also declare under the penalty of perjury that I filed a true and correct copy of Answer of Respondents Gallo and Dankers To Petition For Review with the Clerk of the Supreme Court of the State of Washington by e-mailing said document to supreme@courts.wa.gov .

Dated: October 21, 2013, at Kirkland, Washington.

Abigail A. Landes

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Please find attached, for filing with the Washington Supreme Court, Answer of Respondents Gallo and Dankers and Declaration of Service in the following matter:

Khushdev and Harbhajan Mangat v. Snohomish County et al
WA Supreme Court Cause No. 89332-2
Filed by: Kenneth H. Davidson, WSBA #602
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