89378-1

No. 67712-8-I

IN THE COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON

KHUSHDEV MANGAT, et. ux.,

Appellants,

v.

SNOHOMISH COUNTY, et. al.,

Respondents.

PETITION FOR DISCRETIONARY REVIEW TO WASHINGTON SUPREME COURT (RAP 13.4)

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I. IDENTITY OF PETITIONERS

Petitioners are Khushdev Mangat and Harbhjan Mangat (the "Mangats"). Mangats are appellants in the Court of Appeals ("COA").

II. DECISION WHERE REVIEW IS SOUGHT

Mangat v. Snohomish County ("Mangat I"), no. 67712-8-I, ___ Wn. App. ___, ___, P.3d ___, 2013 Wash. App. LEXIS 2034 (Wash. Ct. App., Aug. 26, 2013); attached hereto as Exhibit A.

III. ISSUES PRESENTED FOR REVIEW

1.) Did the COA err in setting precedent that vested rights allowing nonconforming uses of real property run with the land from the date an application is complete rather than at the time of final plat approval?

2.) If so, whether a completed land use application (which must be processed under the laws in effect at the time of completion), and before any County approval, is personalty owned by its applicants?

IV. STATEMENT OF THE CASE

A. Statement of Facts.

The Mangats are developers, and on September 27, 2007, they executed and submitted a subdivision application to Respondent

Snohomish County ("County")'s Planning & Development Services ("PDS") to develop two adjacent parcels of land; for which they had a contract option to purchase from the land's owners (Respondents Luigi Gallo, and Martha and Johannes Dankers) ("Gallo and Dankers"). (CP 125-26, 141-42, 196, 199-212, 219). The Mangats paid the application fees, and incurred other substantial costs (over $150,000.00) in preparing the application. (CP 142, 196, 410, 481). The respondent Snohomish County did not tell the Mangats that the underlying landowners had a controlling interest in the Application. (CP 37-38, 46-51, 53-59, 127, 196-97). It was deemed complete by operation of law on October 22, 2007. (CP 219, 410, 481). Subsequently, new regulations came into effect, which had the effect of restricting the number of properties which could be developed. (CP 128-33, 142).

Mangats submitted materials for approval of the application. (CP 219-220). Snohomish County admits it took considerably longer than expected to process under its ordinances. (CP 39-40, 196, 216-220, 255, 431). Further, PDS requested additional information on several instances including on May 5, 2009. CP 219; *see also*, CP 47. Thereafter, on December 16, 2009, the purchase and sale agreements expired. (CP 196, 443). Then a dispute arose over whether the intent in the terms of the contract required the Mangats to turn over the subdivision application

(along with the vesting date) or just the "studies, reports, letters, memorandums, maps, drawings and other written documents" prepared for it. (CP 120, 196-97, 211).

On January 10, 2010, respondent Luigi Gallo approached PDS official, Ed Caine, about the application. (CP 120, 416, 446). Ed Caine, admits that he subsequently decided that the application's vested rights "runs with the land" and, as such, respondents Gallo and Dankers could continue to process the application. (CP 214-15, 419-21, 429-30). Mr. Caine then requested Landowners execute forms, including applications, to change the applicants on the file. (CP 415-417, 447-449) (which landowners did on May 6, 2010 and June 18, 2010). Because this occurred more than one year from the last information request, the application should have expired by operation of Snohomish County Code. (CP 219).

The Mangats' voiced their opposition to PDS allowing respondent landowners to take or otherwise enjoy their rights under the Mangats' application. (CP 120, 196-97, 214-215, 420-21). A deputy prosecutor sent a letter stating it was the County's interpretation that the subdivision application under RCW 58.17.033 ran with the land under property law, and thus could be enjoyed by Gallo and Dankers. (CP 214-15). Gallo and Dankers proceeded to resubmit materials, modified studies and plans for the project, and incurred $18,000.00 in fees and costs to do what their

consultant believed was necessary for a recommendation from PDS. (CP 424, 679-82). PDS then recommended the project be approved under Oct. 22, 2007, criteria (and not those in effect in early to mid-2010); and a hearing for the decision was set for April 12, 2011. (CP 242, 254-268).

B. Statement of Proceedings Below.

The Mangats filed the above action on March 22, 2011, seeking declaratory relief, injunctive relief and damages, including compensation for an unconstitutional taking of their private property. (CP 242). Initially, the Mangats moved for a stay of the hearing, which the Hearing Examiner denied. (CP 245, 319-20). The Hon. Judge Robert Leach, *pro tem*, denied the motion for preliminary injunction (CP 560-564). Snohomish County then approved the application.[1]

The County moved for summary judgment on the grounds that the application ran with the land; Gallo and Dankers joined in the motion, and also argued that under the contract the application the Mangats' filed belonged to them. (CP 221-240, 445-477). Mangats' cross moved for summary judgment on the grounds that Ed Caine unlawfully took the Mangats' application, which was personal property. (CP 478-505). At hearing, the Hon. Judge David Kurtz decided to grant the County's motion

[1] The Mangats appealed under LUPA, extraordinary writs, and sought damages (in a separate but *linked* matter). Mangats motion for consolidation of the appeals was denied.

for summary judgment and denied Mangats' cross motion. (CP 9-13). Judge Kurtz stated that the matter:

> [***] boils down to one central legal issue [***] are vested rights from the application *in rem* or *in personam*? [***] that the vested rights from the application do run with the land. The rights are tied to the real property, and in this Court's view it makes little sense if the interests are somehow separated and divorced from the land.

(VROP at 29-33). Gallo and Dankers, then made a request for reasonable attorney's fees under the contract. (*See* VROP at 34) The court then stated:

> Counsel, that was frankly not the focus of the pleadings. I will let you -- frankly it was, in the vast amount of things that I was considering, not something I focused on. If you feel that this is appropriate I guess I'll invite you to renote that and that can be addressed further [***].

(VROP at 34-35). Gallo and Dankers noted such a motion for fees, which the Court then denied. *See* Notice of Cross Review (Oct. 24, 2011).

The record before the Superior Court showed that there was no provision in the agreements that landowners were joint owners of their subdivision application. (CP 195-97, 199-212). The Mangats submitted a declaration regarding that their intent in signing agreement was to own the application in their own right. (CP 195-97). Further, Gallo and Dankers understood this as they had negotiated to have the application transferred to them in exchange for a further extension of the contract of sale. CP 195-97; 639-49. An expert confirmed that there was an existing market

among developers for the sale of vested rights in property. CP 141-42. This evidence regarding the intent of the parties was disputed. CP 629-31.

Mangats then timely appealed the order granting the motion for summary judgment on the grounds that the application ran with the land; and Gallo and Dankers filed a Notice of cross Review on the order denying fees under the contract. CP 1-8. The matter became linked to the LUPA and RCW 64.40 appeal. *See* Link (Aug. 30, 2012). Thereafter, Gallo and Dankers voluntarily dismissed their cross review regarding the contract. *See* Order Granting Voluntary Motion to Dismiss (Nov. 2, 2012).

On August 26, 2013, the Court of Appeals upheld the order by Judge Kurtz. *See generally*, Ex. A (Aug. 26, 2012).

V. AUTHORITY

A. Considerations for Granting Review.

The published decision below is the first decision in Washington, and likely in the United States, to hold that a developer's vesting date occurring as a result the Vested Rights Doctrine to develop a potential non-conforming land use "runs with the land".[2] A petition for review will

[2] There are no cases on point, therefore, the parties cited numerous cases, thar each claimed was most applicable to the "*in personam* versus *in rem*" argument before the COA. *See* Opening Brief ("OB"), pp. 12-21; Snohomish County's Responsive Brief ("Snoco RB"), pp. 14-24; Gallo and Dankers Response ("GD RB") pp. 11-2; 16; 18-19; and Mangats' Consolidated Reply ("Reply"), pp. 18-21, including n. 20. But the briefing, generally, and oral argument, specifically, conceded this appeal involved an issue of "first impression" of substantial public importance. *See e.g.*, GD RP p. 17, 19.

be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4. For the reasons stated below, this court should accept review under all four of the considerations found in RAP 13.4 (1)-(4).

B. This Matter involves issues of substantial public interest that should be determined by the Supreme Court.

During oral argument before the COA, the lead attorney for Snohomish County indicated the importance of the central issue in this lawsuit; namely: whether vested land use applications are the personal property of developers or run with the land?

> [***] a number of other cases out there that involve bank foreclosure, taking back properties that have pending subdivision applications that the bank then took over and completed where there is no contract, other than simply a deed of trust foreclosure. In its, so there is a larger policy issue at play here aside from the contract issue, we would urge the court to affirm the trial court on this specific bases that the vested rights arising under a land use application do in fact run with the land and this not be disposed of on a contract theory. [***]

Audio file of COA oral argument at 19:07-19:35. The County got more than it asked for as the COA decided both issues in appellants favor in a precedent setting decision.[3]

Notwithstanding the acknowledged importance of this issue, the COA was cavalier in its analysis and resolution of the vesting issue on appeal. As Snohomish County told the COA this issue is one of such substantial public interest that it should be resolved by a precedential ruling. In light of the problems with the COA opinion and its significance to Washington land use law the Mangats urge this issue is a matter of substantial public importance which should be determined by this Court.

This case is not a situation where land permits, preliminary or final, were granted or issued to persons at the time of the County's action. Order at 7-8. Relying solely on *Clark*, the COA ignored the vast body of Washington precedent acknowledging that application of vesting rights involves a balancing of the developer's rights to fundamental fairness

[3] The COA decision concluding, as a matter of law, (Ex. A at pp. 9-10) that the intentions of the parties was for the developer to transfer ownership of the application to the landowners instead of providing them "studies, reports, letters, memorandums, maps, drawings and other written documents prepared by surveyors, engineers, biologists, [***]" (CP 211) was clearly beyond its appellate authority. The record is the clear trial court did not make any findings of intent with regard to the meaning of the contract. *See, e.g., Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980) (a court must interpret a contract according to the intent of the parties as manifested by the words used, it can neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it). Had the Court used contract interpretation as grounds, than it would have found there was ambiguity in the terms of the contract and conflicting evidence about what was intended by the parties at the time of execution (*see* CP 195-96, 629-631); and also, applied the fact that Gallo and Dankers drafted the addendum (*see* CP 195, *Wagner*, supra.).

against the public's right to have land use law in effect enforced. *See* Ex. A, at 6-8 (*citing, Clark v. Somerset Hills Memorial Park*, 45 Wn.2d 180, 273 P.2d 645 (1954).[4] *Clark*, does not address the argument of "in rem" or "in personam" prior to preliminary plat. In *Clark*, the County issued approval for the permit to construct a cemetery, which had already been platted.[5] Moreover, there was never any change in the zoning law (which at all times allowed cemeteries) and therefore none of the same public policy issues involving nonconforming uses the County specifically asked the COA to address because of these turbulent economic times.

The issue presented to the Court is different than *Clark*, and other cases where preliminary or final approval are appropriate under existing land use ordinances. It is: whether a vested land use application constitutes

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[4] *See Lauer v. Pierce County*, 173 Wn.2d 242, 258-263, 267 P.3d 988 (2011); *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 274-282, 943 P.2d 1378 (1997).

[5] *Clark* states:

> In July, 1946, the county commissioners, [***] rezoned approximately sixty-six acres of the area from agricultural to third-class residential property. The rezoned property was then owned by Overlake Memorial Cemetery, Inc. ***Later during the same year, the county commissioners granted a permit allowing the newly rezoned third-class residential property to be used for a cemetery.***

Clark, 45 Wn.2d at 182-84 (emphasis added). The land was subsequently sold and the new owners sought to develop the cemetery, which still remained a permitted use in that zone. *Id.* Nonetheless, the neighbors objected and sought an injunction. *Id.* Because no nonconfirming use was contemplated to occur by the new owner's development of the cemetery, the COA's reliance on *Clark* to resolve this appeal is misplaced, as there was no affront to the public interest. The other case relied upon for the County's proposition that a vesting date obtained by a developer filing a complete subdivision application runs with the land was *Northwest Land and Invest. v Bellingham*, 31 Wn.App. 742, 743, 644 P.2d 740 (1982), *see* SnoCo RB, p. 16. *Northwest Land and Invest* never considered that "in personam versus in rem" issue raised here.

personal property of the applicant or immediately, upon submission, vests the right to a future nonconforming use with the land for the benefit of anyone acquiring the land thereafter (including foreclosing creditors)?

> Washington's vested rights doctrine, as it was originally judicially recognized, entitles developers to have a land development proposal processed under the regulations in effect at the time a complete building permit application is filed, regardless of subsequent changes in zoning or other land use regulations.

Abbey Rd. Group, LLC v. City of Bonney Lake, 167 Wn.2d 242, 218 P.3d 180 (2009)(*citing*, *Hull v. Hunt,* 53 Wn.2d 125, 130, 331 P.2d 856 (1958).

> Washington's rule is the minority rule, and it offers more protection of development rights than the rule generally applied in other jurisdictions. [***]. By promoting a date certain vesting point, our doctrine ensures that "new land-use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under the law." *Valley View Indus Park v City of Redmond*, 107 Wn.2d 621, 637, 733 P.2d 182 (1987). ***Our vested rights cases thus recognize a "date certain" standard that satisfies due process requirements.***

Abby Rd. Grp., 167 Wn.2d at 250-1. (Emphasis added). Our "liberal" vesting rule implicates a delicate balancing of interests. *Erickson & Associates v. McLerran*, 123 Wn.2d 864, 873-74, 872 P.2d 1090 (1994) ("The practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. ... If a vested right is too easily granted, the public interest is subverted").

The Mangats loss of their interest in the land, provided a decision point: shall they abandon pursuit of a project which is now against the public's interest; or leverage the advantages obtained and risks taken in preparing the application? CP 142-2. The rights to alienate and destroy are fundamental incidents of property ownership of that application, which cannot be taken by the State without compliance with the Constitution, specifically Const. art. I, §§ 3, 16. *See Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 926, 296 P.3d 860 (2013). *See also*, infra.

The decision below breaks a recent judicial trend in Washington to carefully consider whether a nonconforming use should be allowed simply because a completed land use application has been filed ***because this is against the public interest.*** *See e.g. Lauer*, 173 Wn.2d at 258-263; *Lakey*, 176 Wn.2d at 926; *Graham Neighborhood Ass'n v. F.G. Assocs.*, 162 Wn. App. 98, 112-18, 252 P.3d 898 (2011). The COA chose to not weigh the delicately balanced policies, particularly with regard to public policy, in deciding that vested applications with early vesting dates run with land and can be acquired by non-developers; including those who foreclose on developers. The substantial public interest in limiting those circumstances, where the creation of nonconforming uses are involved, must respect the constitutional underpinnings of the vested rights doctrine recognizing developers interests; and, should not further the creation of nonconforming

uses where there is no constitutional or public interest need to do so. Otherwise the government simply will be taking property from one person to and giving it to another despite the constitutional prohibitions from doing so and in violation of its own existing development regulations.

C. This matter involves questions of law under the Constitution of the State of Washington or of the United States.

Because the COA failed to appreciate the origins of the vesting rights doctrine are constitutional, their opinion resulted in a published decision which construed what was intended to be a statutory limitation on the vested rights doctrine into a decision which increases the number of persons who can claim the right to profit from nonconforming development. *See Lauer*, 173 Wn.2d at 259;[6] *see also*, OB, pp. 12-17. The COA overlooked this point entirely because it failed to acknowledge it must consider that the statute, RCW 58.17.033, was intended to make this Date Certain Vesting Doctrine applicable to subdivisions, but only after the submission of "complete applications" pursuant to municipal

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[6] In *Lauer* this Court described the legislative change to the common law:

> The common law required only that an application be "sufficiently complete," while the legislature decided that the application must be "fully complete." *Compare, id.*; *with, Valley View Indus. Park*, 107 Wn.2d at 638 The legislature abrogated the common law rule when it substituted "fully" for "sufficiently," "taking a 'zero tolerance' approach to completeness." *Friends of the Law v. King County*, 123 Wn.2d 518, 524 n. 3, 869 P.2d 1056 (1994).

Lauer, 173 Wn.2d at 259.

ordinances. OB at 18-21; *see also, Noble Manor Co. v. Pierce County*, 133 Wn.2d at 277-78 (*citing* to Final Legislative Report).

There is no reason here to recount the numerous Washington cases and secondary authorities which make clear the "Vested Rights Doctrine is a limitation of government authority derived from 'constitutional principle of fundamental fairness and due process." *See* OB at 12.[7] When the tire hits the road, the fundamental fairness and substantive due process bases for vesting rights in a "developer" do not extend to vesting the rights in the land sought to be developed until final plat approval. *See* RCW 58.17.165. This is so because land has no constitutional rights. The due process clauses of both the U.S. and Washington Constitutions declare "[n]o person may be deprived of his life, liberty or property without due process of law." Fifth Amendment to the U.S. Constitution made applicable to the States through the Fourteenth Amendment. Wash. Const. art. I, § 3.

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[7] *Weyerhauser v. Pierce County*, 95 Wn. App. 883, 891, 976 P.2d 1279 (1999); *see, Vashon Island v. Washington State Boundary Review Bd. for King County*, 127 Wn.2d 759, 768, 903 P.2d 953 (1995); *Erickson*, 123 Wn.2d at 870, 874; Frederick D. Huebner, *Washington's Zoning Vested Rights Doctrine*, 57 Wash. L. Rev. 139, n.11 (1981)(characterizing certain rights as "vested" signifies a conclusory description of a right or interest that is sufficiently secure or fixed such that divestment of that right is unfair or violates due process); *see also, Abbey Road Group*, 167 Wn.2d at 250-51 (public purpose is to ensure certainty and predictability in land use regulations for the person undertaking the development); *Valley View*, 107 Wn.2d at 636; *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 50-51, 720 P.2d 782 (1986) (the purpose of vesting is to provide a measure of certainty to developers, and to protect their expectations against fluctuating land use policy); *Hull v. Hunt*, 53 Wn.2d 125, 130, 331 P.2d 856 (1958)(vests when the party, property owner or not, applies for his building permit).

Washington's Eminent Domain procedures are limited by Wash. Const. art. I, § 16, which states in pertinent part:

> Private property shall not be taken for private use, ... No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, ... , which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: ...

There has never been any dispute that the vesting date accorded the Mangats as of Oct. 22, 2007, which gave the Mangats rights which allowed them to seek development of another's property without complying with more recently enacted Critical Ordinances, had significant monetary value which could be sold in the marketplace. CP 128-33, 141-2; *see also*, *Valley View*, 107 Wn.2d at 636; Snoco RB, pp. 18; GD RB, pp. 17 (*citing*, *Mission Springs v. Seattle*, 134 Wn.2d 947, 954 P.2d 280 (1958) for the proposition that vesting date rights are valuable property rights). The COA ignored this factual and legal verity by stating that the right had expired in the Mangats and therefore had no value. Of course, if the right had expired in the Mangats, and it was personal to them, then it would hold true that such rights would be gone -- and could not have been

passed on to the land owners. The right would have expired, and the public interest would have been spared a development which did not comply with several more recently enacted Critical Area ordinances.

What did occur, however, was a low level official of Snohomish County decided that he would give Gallo and Danker's the Mangats' vesting date. CP 214-15, 415-21, 429-30. What this did was perform a procedure not listed in the County's devised vesting scheme, and it denied the Mangats the opportunity to negotiate, with others, the sale of the value they created by having "their skin in the game." Mangats moved for summary judgment that this administrative fiat violated their due process rights, Washington's eminent domain Constitutional provision, and the laws enacted to protect them, Ch. 8.08 RCW (*see* CP 221-235).

The County attempted to get around the taking of Mangats' vested rights by claiming the Mangats' vesting date became a part of the real property all along; rather than a personal right of Mangats who earned it as a result of paying a fee and submitting information for their development efforts. CP 214-15, 415-21, 429-30. What is problematic with this determination is: 1.) no ordinance provided the planning department official with authority to make such a far-reaching policy decision; and, 2.) no consideration of the public interests at stake has ever been completed any government official, including the COA, notwithstanding

this was precisely what the County should have received from the COA when it asked for guidance in the form of a published decision. *See* Audio file of COA oral argument at 19:07-19:35; *see also*, CP 29-33, 46-51; *See also, Kershaw Sunnyside v. Interurban Lines*, 156 Wn.2d 253, 126 P.3d 16 (2006).

Thus, the vesting issue now at this Court's doorstep is both one of constitutional magnitude and substantial importance to the parties. However, it is the public which has the greatest interest in resolution of the issue of whether non developers, who have "no skin in the game", can utilize a developer's previous vesting date (without a developer's permission) to continue the process towards creating a nonconforming use.

Assuming this Court agrees in this analysis, the next constitutional issue this Court would have to consider is whether the County complied with Wash. Const. art. I, § 16 relating to eminent domain and/or deprived Mangats' right to due process by failing to comply with the Eminent Domain requirements set forth in Ch. 8.08 RCW. CP 221-35; *see e.g. Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000); *Valley View*, 107 Wn.2d at 636-44. *Cf. Kershaw Sunnyside.* In this regard, it is important to remember that Mangats as the owners of the vested right had the right to alienate or exclude others from their personal property. *Manufactured Housing*, 142 Wn.2d at 364; *see*

also, OB at 31-33 (intangible expectancies as property rights. *See, e.g.*, *Kimball Laundry v. United States*, 338 U.S. 1, 8(1949).The Mangats wanted to exclude Gallo and Dankers from their application. CP 120, 196-97, 211. But the County, without any authority or process pursuant to RCW 8.08.005, *et. seq.*, gave Mangats' property to Gallo and Dankers.

In summary, the substantial public interest inherent in the COA's published opinion dramatically expands date certain to persons other than the applicant for the use, which is part and parcel of the constitutional considerations which mandate review of this case by this Court.

D. The published decision conflicts with Supreme Court and Court of Appeals Authority.

When construing RCW 58.17.033, the Court of Appeals refused to take into account the well accepted premise that this statute was intended, by the legislature, to codify Washington's "minority common law" vested rights doctrine with regard to subdivisions. Ex. A, at p. 5. Instead the Court of Appeals stated it must rely on the plain language of the statute. *Id.*[8] This restriction on the COA's review of the RCW 58.17.033 is

[8] While it is true that this Court has indicated that it will generally consider legislative history where a statute is clear on its face, *see e.g., Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002), this rule is not followed where statutes are enacted to adopt, change or reject judicial decisions because the ultimate goal is to determine the intention of the legislature. Here, by assuming RCW 58.17.033 was written on a clean slate, the COA ignores the facts the legislature was intending to restrict previous rulings relating to vested rights. *See* Ex. A, at pp. 5-6. This allowed it to assume,

directly contrary to several decisions of this Court and the Court of Appeals which construe this statute based on the premise that the legislature was responding to judicial decision-making; i.e. adopting the judicial "Vesting Rights Doctrine" for subdivisions with one ***limitation***. *See e.g., Noble Manor Co.*, 133 Wn.2d at 274-282; *Association of Rural Residents v. Kitsap County,* 141 Wn.2d 185, 194-96, 4 P.3d 115 (2000); *Graham Neighborhood Ass'n*, 162 Wn. App. at 112-18.

With all due respect, there are no appellate cases at all which support this COA ruling that a court should rely only on the plain words of a statute where the statue is a direct result of interaction between two branches of government. In *Hale* this Court stated clearly the primary duty with regard to statutory construction is the "obligation to determine and carry out the intent of the legislature." *Hale v. Wellpinit Sch. Dist. No. 49,* 165 Wn.2d 494, 509, 198 P.3d 1021 (2009). The COA ignored this "prime directive" by refusing to acknowledge the judicial origins of RCW 58.17.033. Where the legislature and judiciary react to one another, the separation of powers requires the court to be aware and consider their interaction when construing any statute which results therefrom. *Id.*

The COA's restrictive view of this legislation requires review because it is problematic with regard to that Court's resolution of the

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incorrectly, that the legislature intended they not be grounded to only those persons who have "skin in the game."

issues before it, which included who was entitled to the vested right and whether the vested right was personal property or real (in rem) property. By jettisoning the legislative history, the COA was able to ignore that it only mentioned "applicants" and "developers" as being entitled to vesting rights. *See* OB, pp. 17-22; CP 159:9-160:22. Further, it allowed the COA to conveniently overlook the fact that all of the decisions within the penumbra of Washington's vesting doctrine involve developers, albeit some owner-developers. But not one appellate case suggests a mere landowner is entitled to subvert "public policy" (*see* supra.) under the Vesting Doctrine. Moreover, when Ch. 58.17 RCW is read in its entirety, it specifically mentions the landowner only with regard to being provided notice of the developer's application and signing off on the application ***at the end of the process when the nonconforming use becomes final.*** RCW 58.17.090, .165; OB pp. 21-22. Finally, by avoiding the significance of the vesting doctrine, the COA minimizes the fact that the Snohomish County Code refers only to applicant, not owner, *Compare,* Ex. A, p. 6 *with*, OB, pp. 22-23.[9]

The COA's opinion also is not consistent with its own decision in *Graham Neighborhood Ass'n v. F.G. Assocs.*, supra, in another way. The

[9] As well as the binding testimony of the County's expert that there is no statute, ordinance, or regulation which suggests an owner is the equivalent of an applicant. CP 14:26-15:9; 27:22-28:15; 30:3-35:5; see also, CP 21:6-22:9 (Apparently the County amended its ordinances to give owners more rights with regard to vesting).

COA's decision avoids application of *Graham* by claiming Mangats never argued below that the County could ignore the County's own ordinances. Ex. A, at pp. 10-11. This is flat out ***untrue.*** *See e.g.*, CP 160:22-163:8; *see also,* CP 23:4-26:12, 144:7-19; 156: 3-13. Moreover, the issue is constitutional in scope, as such arguments relate to Constitutional basis for allowing Gallo and Dankers to build a development clearly in violation of existing land use regulations. *See* RAP 2.5(a).

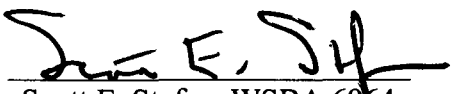
In any event, the COA should not have ignored all the existing precedent, of which *Graham* is only a recent example, which requires the judiciary to balance the rights of those claiming a nonconforming use against the constitutional rights of developers which require allowing such use. The COA did not consider the public interest at all in its decision and therefore this Court should accept review and reverse the COA decision.

VI. CONCLUSION

Based on the foregoing, this court should grant the petition and accept review of the Aug. 26, 2013, *Mangat I*, no. 67712-8-I decision.

Respectfully submitted this 24 day of September, 2013, by:

STAFNE TRUMBULL, LLC



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Certification of Service

I, Shaina Dunn, the undersigned, declare under the penalty of perjury that I served a true and correct copy of Appellants Petition for Discretionary Review on Respondents' attorney by giving a copy of that document to ABC Legal Messenger Service for delivery to the following individuals:

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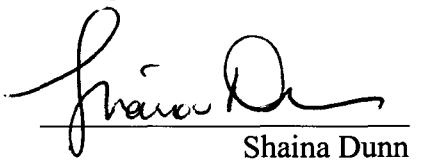

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EXHIBIT A

***Mangat v. Snohomish County ("Mangat I")*, no. 67712-8-I,**
___ Wn. App. ___, ___ P.3d ___,
2013 Wash. App. LEXIS 2034
(Wash. Ct. App., Div. 1, Aug. 26, 2013).

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

KHUSHDEV MANGAT and HARBHAJAN MANGAT, and the marital Community comprised thereof, Appellants, v. SNOHOMISH COUNTY, a political Subdivision of the State of Washington LUIGI GALLO, a single man, JOHANNES DANKERS and MARTHA DANKERS, and the marital community comprised thereof; Respondents.	No. 67712-8-I/Linked w/68739-5-I DIVISION ONE PUBLISHED OPINION FILED: August 26, 2013

SPEARMAN, A.C.J. — Nothing in RCW 58.17.033 or chapter 30.70 SNOHOMISH COUNTY CODE grants those who have filed permit applications to develop real property a vested right to "process" the application independent of an ownership interest in the land. As such, we reject Khushdev and Harbhajan Mangat's argument that the hearing examiner and the trial court decisions, which allowed property owners Luigi Gallo and Johannes and Martha Dankers to move forward with a development application the Mangats originally filed, amounted to a taking of the Mangat's private property. Affirmed.

FACTS

This appeal arises out of the Mangats failed attempt to purchase and develop two contiguous pieces of property, one owned by the Dankers and the other owned by

Gallo. The purchase and sale agreements contained identical terms: they allowed the Mangats to begin developing the land by seeking a plat application to subdivide the properties, but in the event the Mangats defaulted on their attempt to purchase, they were required to turn over all materials related to the plat application to the Dankers and Gallo.

The Mangats were unable to secure financing and defaulted. The Dankers and Gallo continued the plat application process started by the Mangats. The Mangats sued the Dankers, Gallo, and Snohomish County, arguing that the substitution of the Dankers and Gallo on the application amounted to an unconstitutional taking of their property and that it violated their right to substantive due process. The complaint sought declaratory relief and injunctive relief prohibiting Snohomish County from further consideration of the application.

Shortly after filing suit, the Mangats obtained an ex-parte temporary restraining order (TRO) from a court commissioner restraining the hearing examiner from further action on the plat application. The Dankers and Gallo moved to quash the TRO, and the parties entered an agreed order quashing it. The hearing examiner rescheduled the hearing for May 11, 2011. The Mangats moved for a preliminary injunction, staying proceedings on the plat application. After a hearing on May 3, 2011, the motion for a preliminary injunction was denied.

On May 11, the hearing examiner held a hearing on the plat application. On May 17, the hearing examiner entered a decision granting approval of the Dankers' and

Gallo's plat application. The Mangats appealed the hearing examiner's decision to the Snohomish County Council. The Dankers and Gallo moved for dismissal, and the Council granted dismissal on June 15, 2011.

On July 5, 2011, the Mangats filed a second lawsuit, a Land Use Petition Act (LUPA) appeal seeking review of decisions of the Council and the hearing examiner. The petition also sought writs of mandamus and prohibition against the County, as well as damages against the County under chapter 64.40 RCW. Id.[1]

In July 2011, the County, the Dankers, and Gallo moved for summary judgment dismissal of all claims raised in the first lawsuit. The Mangats cross-moved for summary judgment. On August 17, 2011, Judge Kurtz granted the motions for summary judgment, denied the Mangats' cross-motion, and dismissed the case. The Mangats appeal of that order is the subject of this opinion.[2]

DISCUSSION

Standard of Review. "In reviewing a grant of summary judgment, we engage in the same inquiry as the trial court." Deveny v. Hadaller, 139 Wn. App. 605, 616, 161 P.3d 1059 (2007) (citing Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030

[1] The Mangats apparently had filed another lawsuit against Dankers and Gallo, claiming unjust enrichment. They voluntarily dismissed that suit, however, and it is not at issue here.

[2] In September 2011, the County moved for partial summary judgment, seeking dismissal of the Mangats' LUPA petition and the claims for writs of mandamus and prohibition in the second lawsuit. Dankers and Gallo joined the motion. On October 19, 2011, Judge Farris dismissed the Mangats' LUPA petition and the claims for writs of mandamus and prohibition. On April 10, 2012, Judge Bowden dismissed the Mangats' remaining claim for damages against the County under ch. 64.40 RCW (for untimely processing of a permit application).The Mangats' appeal of those two orders is linked with this appeal under No. 68739-5-I.

(1982)). "A summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Id. (citing CR 56(c) and quoting Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990)). "'We review the trial court's conclusions of law de novo, . . .'" Id. (quoting Bingham v. Lechner, 111 Wn. App. 118, 127, 45 P.3d 562 (2002)), "but we may affirm the trial court 'on any basis the record supports.'" Id. (quoting Graff v. Allstate Ins. Co., 113 Wn. App. 799, 802, 54 P.3d 1266 (2002)).

In their complaint, the Mangats sought declaratory and injunctive relief under two related theories: (1) permitting the Dankers and Gallo to continue forward with the plat application they originally started amounted to an unconstitutional taking of their property; and (2) permitting the Dankers and Gallo to continue forward with the plat application they originally started violated their right to substantive due process.

The Mangats make three main arguments on appeal: (1) RCW 58.17.033(1) and Snohomish County Code (SCC), ch. 30.70 grant those who have filed permit applications to develop real property the right to process the application; (2) any rights provided by development permits do not attach to the land until the permit is actually approved, therefore the right to process a development permit application "cannot be enjoyed" by an owner who is not an applicant; and (3) permitting the Dankers and Gallo to continue forward with the plat application the Mangats originally started, amounted to

an unconstitutional taking of the Mangats' property. We reject these arguments and affirm the trial court.

Applicant's alleged right to process development application. The Mangats argue RCW 58.17.033(1) grants those who have filed permit applications to develop real property the exclusive right to process the application. The statute reads as follows:

> A proposed division of land, as defined in RCW 58.17.020, shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted to the appropriate county, city, or town official.

The Mangats contend the statute is ambiguous because "the party who benefits from the rights in [the statute] is not defined, . . ." See Br. of Appellants at 18. Based on this alleged ambiguity, the Mangats argue that we must resort to statutory interpretation to resolve the issue. The Mangats then argue that in applying the rules of statutory interpretation, it is apparent that the legislature's intent was to provide only to permit applicants the right to process the application, to the exclusion of other parties who may have an interest in the land.

We disagree that the statute is ambiguous and decline the Mangats' invitation to add to RCW 58.17.033(1) a provision providing that any rights associated with the application attach, upon filing, to a particular person or entity. The statute's plain language provides that an application to divide land is to be considered under the zoning ordinances in effect at the time of the application. We will not "insert words into a

statute where the language taken as a whole, is clear and unambiguous." State v. Watson, 146 Wn.2d 947, 955, 53 P.3d 1 (2002).[3]

Likewise, nothing in ch. 30.70 SCC states that those who have filed permit applications to develop real property have some kind of ownership interest in the application. Although the Mangats are correct that the chapter repeatedly uses the word "applicant," that is hardly surprising given one of the purposes of the chapter is "to establish procedures for processing project permit applications[.]" SCC 30.70.010(1). Given the Mangats cite no authority in support of their argument, we reject it.

Moreover, as the respondents correctly point out, our courts have consistently held that zoning and permit rights run with the land, not with the person applying for the permits. Indeed, in Clark v. Sunset Hills Memorial Park, 45 Wn.2d 180, 273 P.2d 645 (1954), our Supreme Court explicitly recognized that land use permit rights run with the land, and are not personal to the person who obtained the permit. In that case, Overlake

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[3] Even if judicial construction of the statute was necessary, we would reach the same result. When interpreting a statute "[t]he court must give effect to legislative intent determined 'within the context of the entire statute.'" Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). (quoting State v. Elgin, 118 Wn.2d 551, 555, 825 P.2d 314 (1992)). When RCW 58.17.033(1) is read in context with other portions of the chapter, it is clear the Legislature did not intend to grant those who file permit applications some kind of ownership interest in the application, independent of the land or its owners:

> Every final plat or short plat of a subdivision or short subdivision filed for record must contain a . . . statement that the subdivision or short subdivision has been made with the free consent and in accordance with the desires of the owner or owners.
>
> . . .
>
> Said certificate or instrument of dedication shall be signed and acknowledged before a notary public by all parties having any ownership interest in the lands subdivided and recorded as part of the final plat.

RCW 58.17.165 (emphasis added).

Memorial Cemetery obtained a permit allowing its property to be used for a cemetery. Clark, 45 Wn.2d at 183. Overlake began preparing the land to be used as a cemetery, and filed a plat and dedication of the property as a cemetery. Id. Overlake became insolvent, however, and attempted to sell the property. After a title company refused to insure the title as free from encumbrances (because of the dedication of the land as a cemetery), Overlake started proceedings to vacate the plat and dedication. Id. After vacating the plat, Overlake sold and conveyed the property to Modern Home Builders. "The conveyance included the sixty-six acres zoned, R-3 Residential, with permit for a cemetery." Id. Modern Home Builders, in turn, conveyed five acres of the property to individuals who began operating a cemetery, Sunset Hills Memorial Park, on the five acres. Id.

Several people who owned property in the vicinity sued to enjoin operation of the cemetery. Among other things, they argued that establishment of the cemetery was unlawful because no permit was issued specifically to Sunset Hills. The supreme court rejected this argument holding that "the term 'permit,' when used in connection with zoning, is merely a matter of zoning terminology, a sub-classification or refinement of land-use classification, rather than a personal privilege or license." Id. at 189. The court went on to hold:

> The exercise of zoning powers by county planning commissions and boards of county commissioners involves more than the granting of purely *personal* licenses or privileges . . .
>
> . . .

> These powers do not contemplate the restriction or authorization of land use on the basis of *ownership by particular persons.*

Id. at 189-90). We reject the Mangats' arguments on this issue.

The Mangats next contend that any rights provided by a development permit do not attach to the land until the permit is actually approved.[4] From this premise, the Mangats argue there is a right of "processing of the application" that "cannot be enjoyed" by an owner who is not an applicant. We disagree. The Mangats argue that the subdivision process is not an *in rem* proceeding until there is a preliminary plat approval. But as the Dankers and Gallo point out, this would mean that "the vested rights of a subdivision application float as personal rights of the applicant to be assigned and governed by the applicant's whim until the moment of preliminary approval of the subdivision, when they then attach to the real property." Response Brief of Dankers at 25. The Mangats have cited no authority for this novel legal theory and we decline to adopt it.

The Mangats also argue that Washington's vested rights doctrine protects only right of the developer-applicant before a permit is granted. But their reliance on Hull v. Hunt, 53 Wn.2d 125, 331 P.2d 856 (1958) in support of that proposition is misplaced. The central holding in Hull was that, unlike what was then the majority rule regarding vested rights, Washington courts measure when rights are vested by the date of the permit application. Hull, 53 Wn.2d at 130. Although the court rejected the City of

[4] The Mangats do not cite to any authority which explicitly supports this premise. Instead, they provide a litany of citations to, among other things, authority defining the meaning of *in rem* jurisdiction; case law where the court held a conditional use permit ran with the land; case law where the court held a construction permit ran with the land; case law defining when a covenant runs with the land; and multiple cases holding that personal contracts do not run with the land.

Seattle's attempt to argue only an owner or agent of the owner could apply for a development permit, the court did not hold that an applicant has some kind of ownership interest in the application. Indeed, the court stated that for such applicants "there will generally be a good faith expectation of acquiring title or possession for the purposes of building[.]" Id. In sum, we reject the Mangats arguments on this issue.

Alleged unconstitutional taking. The Mangats next argue that the County's decision to permit the Dankers and Gallo to continue forward with the plat application amounted to an unconstitutional taking of the Mangats' property. Under our state constitution, "No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner. . . ." WASH. CONST., ART. I, § 16. The threshold question that must be answered here is whether the Mangats had any property interest in the plat application. We hold they did not.

Here, whatever interest the Mangats had in the Dankers' and Gallo's properties was extinguished when they defaulted on the purchase and sale agreements. It is undisputed that after an extension of the closing date required by the purchase and sale agreements, the Mangats were to complete the purchase by December 16, 2009. It is also undisputed that the purchase and sale agreements "expired" without the Mangats purchasing the property after their lender declined to advance them a development loan. It is further undisputed that after the Mangats failed to complete the purchase, the terms of the agreement required them give the Dankers and Gallo all documents related

to the subdivision of the property, and permitted Dankers and Gallo to proceed with obtaining approval of the plat application.

In other words, as of December 16, 2009, the Mangats had no interest, prospective or otherwise, in the Dankers' or Gallo's properties. As the trial court explained when it denied the Mangats' motion for a preliminary injunction, there was nothing left for the Mangats to own that could be subject to a taking:

> 6. The filing of the subdivision application by plaintiffs with Snohomish County was merely a request to develop the subject property. While the filing of an application vests certain developmental rights as they relate to the subject property, there can be no ownership interest in the application itself independent of the real property to which it pertains. Any vested rights created by the filing of such an application belong to the landowner who has the legal right to develop the property.
>
> . . .
>
> 8. When they defaulted under the contract, the plaintiffs lost the right to purchase the property and were required to turn over to the Dankers and Gallo the maps, drawings, reports and other work product related to the subdivision of the land. There is nothing left for them to own.

Clerk's Papers (CP) at 560-63 (ruling denying motion for preliminary injunction). In short, the trial court did not err in granting summary judgment on this issue.

County's authority regarding the plat application. The Mangats make two additional arguments: (1) the County had no authority to "revive" their application because it had expired; and (2) the County had no authority to "backdate" the plat application. These arguments, however, were never made to the trial court and are instead being raised for the first time on appeal. As such, we decline to consider them.

RAP 2.5(a) (appellate court may "refuse to review any claim of error which was not raised in the trial court").

Affirmed.

Spearman, A.C.J.

WE CONCUR: