Supreme Court Case No. 93999-1

SUPREME COURT OF THE STATE OF WASHINGTON

MARK AVOLIO, JOHN BAKER, MAUREEN DeARMOND, and ANDY MERKO,

Petitioners,

v.

CEDARS GOLF, LLC,

Respondent.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW BY THE WASHINGTON SUPREME COURT

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INTRODUCTION

Respondent Cedars Golf, LLC ("CG") owns Lots 1 and 8 ("Lots") in The Cedars Phase II subdivision in Battle Ground, Washington. Petitioners own lots in the same and an adjacent subdivision. On July 22, 2014, the City of Battle Ground approved the subdivision of the Lots, over the objection of Petitioners, all of whom participated directly or through counsel in the Battle Ground hearing process. The land use approval from the City was appealed by Petitioner Avolio. Despite being fully informed of the City decision and their appeal rights, all of the other Petitioners elected not to appeal. Upon appeal, the Clark County Superior Court affirmed the City decision. Petitioner Avolio elected not to appeal the decision of the Superior Court.

Months later, Petitioners filed the subject claim in Superior Court, seeking to enjoin the approved subdivision of the Lots, which is a final land use decision that is binding on the City, CG, and all other parties. The Superior Court granted summary judgment in CG's favor, ruling that Petitioners' claims were barred by the doctrine of collateral estoppel. Upon appeal by Petitioners, the Court of Appeals issued a unanimous unpublished opinion, *Avolio, et al., v. Cedars Golf*, No. 48016-6-II, 2016

WL 6708089, entered November 15, 2016 ("Unpublished Opinion").[1] In affirming the summary judgment, the Unpublished Opinion addressed all of Petitioners' arguments.

Some two and a half years after the subdivision approval, Petitioners are now seeking discretionary review from this Court. Petitioners have twice been unsuccessful on the merits of their claim (before the City of Battle Ground and the Superior Court) and twice unsuccessful on their present claims (before the Superior Court and the Court of Appeals). Having made their identical claim without avail in four distinct proceedings, Petitioners now ask this Court to accept review in a last ditch attempt to reverse the Unpublished Opinion's holding that they are collaterally estopped from bringing their claim yet again.

By engaging in the kind of serial appeals and redundant claims which collateral estoppel is intended to prevent, Petitioners have frustrated the City subdivision approval and successfully delayed the development of the Lots for over two and a half years. Such unwarranted delay comes at extensive detriment to CG and has prolonged litigation by Petitioners in circumstances where they either elected not to exhaust available appeals by failing to appeal the City approval and/or Superior Court's judgment affirming the City approval.

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[1] A copy of the Unpublished Opinion is attached to the *Petition for Review* ("*Petition*") as Exhibit A-1.

I. COUNTERSTATEMENT OF THE CASE

The dispute between these parties began in 2014, when CG submitted an application to the City of Battle Ground requesting approval to take two actions: (1) alter The Cedars Phase II subdivision plat; and (2) subdivide lots 1 and 8 of The Cedars Phase II ("The Lots").

A. Subdivision Application before the Battle Ground Hearings Examiner

A hearing was held before a City of Battle Ground Hearing Examiner on June 25, 2014. (CP 252). As noted, all of the Petitioners participated in the local review of CG's land use application, personally or through legal counsel. Specifically, Petitioners Avolio, DeArmond, and Merko, were represented by attorney Mark Stoker who submitted multiple letters and a copy of The Cedars Declaration of Covenants, Conditions, and Restrictions dated February 23, 1973, Clark County Auditor's File No. G27415 ("CC&Rs") to the Hearing Examiner, arguing the proposed subdivision violated one or more provisions of the CC&Rs. (CP 101-146).

Petitioners Baker, DeArmond, and Merko also submitted emails and/or letters to the City of Battle Ground in opposition to CG's application and expressly requested to be a party of record and notified of all decisions and appeal rights relating to CG's application. (CP 101-146). Attorney Stoker and Petitioner DeArmond both provided oral testimony

before the Hearing Examiner at June 25, 2014 hearing of the local appeal. (CP 255- 56).

The Hearing Examiner considered all of the testimony and approved the application. In response to Mr. Stoker's contentions, the Hearing Examiner compiled a list of disputed issues. The first issue listed is: "Whether the proposed development will conflict with Conditions Covenants and Restrictions ('CC&Rs') applicable to the site." (CP 253). The Hearings Examiner found the proposed subdivision to be consistent with the CC&Rs based on extensive findings of compliance with RCW 58.17.215, which governs review and approval of subdivision alterations. CP 257.

The Hearing Examiner's decision approved a plat alteration to remove the "Townhouse" designation from The Lots and approved the subdivision of The Lots. (CP 262). The practical effect of the approval is to reduce the allowed development of the lots from the 42 townhomes that could have been built prior to the approval, to only allowing 13 single-family homes after the approval. *Id.*

B. Land Use Petition before the Superior Court

Only Petitioner Avolio appealed the Hearing Examiner's approval to Clark County Superior Court (Case No. 14-2-02337-9), pursuant to the

Land Use Petition Act ("LUPA") at RCW 36.70c, et seq.[2] Petitioner Avolio, CG, and the City of Battle Ground were all parties to that proceeding and represented by counsel. (CP 151). The parties thoroughly briefed the issue of the applicability of the CC&Rs in that matter. In fact, the only issue raised by Mr. Avolio in that proceeding was the applicability of the CC&Rs and the corresponding effect of RCW 58.17.215. (CP 90).

The parties appeared before and presented argument to The Honorable Gregory Gonzales of the Clark County Superior Court. Judge Gonzales affirmed the City decision. In so holding, Judge Gonzales made the following findings of fact and conclusions of law:

> 2. With regards to Petitioners' claim that the Hearing Examiner's approval violated CC&Rs applicable to Cedars Phase II, the Court makes the following findings:
> ***
> C) The Hearing Examiner correctly found the CC&Rs of February 23, 1973 are not applicable to Cedars Phase II, and the record contains no substantial evidence to the contrary;
> D) The Hearing Examiner correctly found the subdivision of lots 1 and 8 of Cedars Phase II does not violate the CC&Rs of February 23, 1973. (CP 152).

[2] The Petition for Appeal was filed by Stephen Leatham, an attorney in the same firm as Mark Stoker, who was the attorney that represented Plaintiffs Avolio, DeArmond, and Merko in the Battle Ground land use review.

Judgment was entered on March 20, 2015. No appeal was made of Judge Gonzales' decision and findings. (CP 151-54).

C. A Second Action Before Superior Court

On May 5, 2015, Petitioners filed this action against CG for declaratory relief and injunction. (CP 1-36). The relief prayed for is a declaration that CG may not subdivide The Lots and an injunction against subdividing The Lots. (CP 6).

CG moved for summary judgment against Plaintiffs' claims, asserting that (1) the trial court lacked jurisdiction to hear this claim, because it was barred by LUPA, and (2) alternatively, that the claims were barred by res judicata as to Plaintiff Avolio and collateral estoppel as to each of the other Plaintiffs. (CP 165).

Petitioners themselves moved for summary judgment, arguing, as they do here, that the CC&Rs forbid subdivision of Lots 1 & 8, and that the determination of the Hearing Examiner and the Superior Court had no preclusive effect of any type as to Petitioners, because interpretation of the CC&Rs was outside of the City's jurisdiction (and outside of the Superior Court's jurisdiction on review), notwithstanding the contentions presented to Judge Gonzales. (CP 182).

A hearing on the cross-motions for summary judgment before Clark County Superior Court Judge Lewis took place on August 20, 2015.

During the hearing, Judge Lewis presented the following question to Mr. Petitioners' counsel:

> THE COURT [to Mr. Erickson]: I guess what I keep coming back to, isn't [to find a CC&R violation] what your clients asked the hearing examiner to do? They didn't come in and say, ["]By the way, hearing examiner, don't -- don't enforce these restrictive covenants, whatever you do here, because you don't have authority to do that.["] They came in and said, ["]We want you to deny this application, because there's a restrictive covenant that prohibits -- prohibits subdivision, and we want you to enforce it.["] So they didn't have any problem with the idea that if he ruled for them, he had the authority to enforce the covenant. It's only after he said, No. I'm not going to do it, that all of a sudden he didn't have the authority.
>
> MR. ERIKSON: You're correct.
>
> THE COURT: So –
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> MR. ERIKSON: That's what prior counsel did.
>
> THE COURT: Isn't that what collateral estoppel is all about –
>
> MR. ERIKSON: No. Collateral –
>
> THE COURT: -- that having had an opportunity to deal with the issue, and -- and having lost, you can't now come back and take another bite at the apple?
>
> MR. ERIKSON: No. Because we take a position that collateral estoppel only applies to decisions within jurisdiction. (RP 15:3-16:6).

Later in the hearing, Judge Lewis ruled on the merits, granting Defendant's motion on the grounds of res judicata and collateral estoppel.

That ruling was incorporated into the Order on Defendant's Motion for

Summary Judgment and Plaintiffs' Cross-Motion for Summary Judgment (CP 371-73).

Petitioners appealed Judge Lewis' order to the Court of Appeals. Petitioners again reiterated their claim, despite Judge Gonzales' decision, that the CC&Rs preclude division of the Lots, and again were rebuffed as the proceeding resulted in the issuance of the Unpublished Opinion affirming Judge Lewis' order.

II. ISSUES PRESENTED FOR REVIEW

The Issues Presented for Review in the *Petition* must mirror the RAP 13.4 criteria for acceptance of review. Properly restated, the issues are as follows:

Issue 1: Whether the Unpublished Opinion is in conflict with a decision of the Washington Court of Appeals or this Court?

Issue 2: Whether the Unpublished Opinion involves a significant question of law under the Constitution of the State of Washington or the United States of America?

Issue 3: Whether the Unpublished Opinion involves an issue of substantial public interest that should be determined by the Supreme Court?

III. ANSWERS TO ISSUES PRESENTED FOR REVIEW

Answer 1: The Unpublished Opinion is readily distinguished from the appellate opinions identified by Petitioners as allegedly conflicting. These opinions all hold that a subsequent claim for monetary damages resulting from a LUPA proceeding is not barred by collateral estoppel. Petitioners make no such claim for monetary damages.

Answer 2: The Unpublished Opinion does not violate the Constitution of the State of Washington or of the United States. The Unpublished Opinion neither impairs the rights of the parties to the CC&Rs nor violates the separation of powers and due process rights afforded by the Constitutions of the State of Washington and United States. Further, no constitutional issues have been previously raised at any level.

Answer 3: The Unpublished Opinion does not involve any issue of public interest, as it is limited to a determination of whether collateral estoppel bars re-litigation of a claim about the meaning of the CC&Rs, a private covenant. The issues decided in the Unpublished Opinion are unlikely to recur or impact a large number of people. Based on the unrefuted record, this is a case decided on specific facts which implicate not matters of public interest, but rather litigation unique to the four Petitioners.

IV. ARGUMENTS WHY REVIEW SHOULD BE DENIED

The *Peition* fails to demonstrate that any of the four conditions of RAP 13.4(b) are met: (1) the decision of the Court of Appeals is in conflict with a decision of the Washington Supreme Court; (2) the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; (3) a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

A. The Court of Appeals' Decision is consistent with this Court's opinions in *Lakey*, *Hayes*, *Woods View II*, and *Asche*.

The *Petition* argues that the Unpublished Opinion is in conflict with this Court's opinions in *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013) and *Hayes v. City of Seattle*, 131 Wn.2d 706, 709, 934 P.2d 1179, 1180 (1997), *opinion corrected*, 943 P.2d 265 (Wash. 1997), and the opinions of the Court of Appeals in *Woods View II v. Kitsap County*, 188 Wash.App. 1, 352 P.3d 807, *review denied*, 184 Wash.2d 1015, 360 P.3d 818 (2015) and *Asche v. Bloomquist*, 132 Wash.App. 784, 133 P.3d 475 (2006), *review denied*, 153 Wash.2d 1005, 153 P.3d 195 (2007). However, these opinions are readily distinguished from the facts of this case and are consistent with the Unpublished Opinion.

Each of the cases cited in the *Petition* deals with whether courts have jurisdiction to hear a claim for monetary damages arising from a land use decision if such a claim is filed outside of the LUPA process. These opinions consistently hold that courts do have such jurisdiction to hear claims that are limited to monetary damages, do not require application of zoning codes, and do not challenge or seek to overturn the underlying land use decision. Here, Petitioners seek to overturn the subdivision of the Lots and seek no monetary compensation. Thus, finding the Petitioners are barred by collateral estoppel, as the Court of Appeals does in its

Unpublished Opinion, is consistent with the opinions in *Lakey*, *Hayes*, *Woods View II*, and *Asche*.

Lakey and *Hayes* both deal with different underlying land use claims that were adjudicated through the LUPA process, and were followed by separate claims for compensation. In *Lakey*, the claim was for inverse condemnation. *Lakey*, 176 Wn.2d at 909. In *Hayes*, the claim was for arbitrary imposition of restrictions on a previously-granted development approval. *Hayes*, 31 Wn.2d at 706, 710. *Woods View II* and *Asche* deal with development-related claims against local governments that were brought outside of the LUPA process. In *Woods View II*, the court allowed claims for damages associated with tortious interference and negligence. *Woods View II*, 88 Wash.App., at 24-25. In *Asche*, the court held that claims for public nuisance required application of the zoning code and were dependent on the validity of a land use decision, and therefore must be brought under LUPA. *Asche*, 132 Wash. App., at 800-801.

Petitioners' claim is dependent upon questioning the validity of the land use decision approving subdivision of the Lots, and therefore is preempted by the LUPA action. No claim for monetary damages has been made. Thus, each of the cases cited by Petitioners is consistent with and supports the holding in the Unpublished Opinion. Furthermore, unlike the

other cases, the very issue re-raised by Petitioners was raised and decided in the LUPA action.

B. The Court of Appeals' Decision does not involve a question of law under State of Washington or United States Constitutions.

The Unpublished Opinion does not impair any private contractual rights under the CC&Rs. Instead, the Unpublished Opinion simply applies the doctrine of collateral estoppel to prevent Petitioners from further litigating an issue which they have already litigated and lost. Tellingly, the *Petition* argues that an impairment of a contractual right only occurrs if RCW 58.17.215 "authorizes the hearing examiner to determine that the [CC&Rs] are unenforceable." *Petition*, p. 18. The Hearings Examiner and the Superior Court did not declare the CC&Rs to be unenforceable. Rather each hold the CC&Rs are simply not applicable to the Lots. Thus, by the very terms of the *Petition*, no impairment of a private contract has occurred.

Petitioners' argument about separation of powers ignores the content of the land use decision made by the Hearing Examiner and Judge Gonzales. The decision applies RCW 58.25.215, as is required of a local government in order to review a subdivision alteration. Application of this statute is not the exclusive original jurisdiction of the courts, as Petitioners appear to infer. Additionally, Petitioners rely on the language of RCW

2.08.010 in support of their separation of powers argument. The language of RCW 2.08.010 is not found in the Constitutions of the State of Washington or in the U.S. Constitution, and this Court can accordingly discount this argument.

Finally, Petitioners argue that their due process rights are at issue because the LUPA process afforded them no "meaningful" opportunity to be heard. This argument is belied by the facts, as the Petitioners all participated in the City land use process, and Petitioner Avolio was heard on appeal by Judge Gonzales, the others having accepted the Hearing Examiner's decision as final. The Unpublished Opinion adequately disposes of this issue in stating that:

> [Petitioners] had a full and fair opportunity to litigate the issue before the hearing examiner and on appeal to the superior court and, importantly, they were represented by counsel. Procedurally, collateral estoppel does not work an injustice. [Petitioners] claim that collateral estoppel works an injustice based on 'disparity of relief.' However, there is no such disparity of relief ... The relief would have been identical had the [Petitioners] succeeded before the hearing examiner, in the superior court LUPA petition, or in the superior court declaratory judgment action.

In sum, CG has prevailed before the City, the Superior Court (twice), and the Court of Appeals, all on the same arguments over the same land use decision. In each instance, had Petitioners' prevailed, they would have achieved their desired remedy of stopping the subdivision of the Lots.

Thus, no due process or other Constitutional questions of law are involved in the Unpublished Opinion.

C. The Court of Appeals' Decision does not involve an issue of public interest.

Resolution of whether Petitioners are precluded from re-arguing the meaning of private covenants does not involve an issue of public interest. Here, the CC&Rs are a contract between private parties only, the application and meaning of which has no bearing on the broader public. Petitioners acknowledge this point, stating that "interpretation and enforcement of the [CC&Rs] is a private concern ... " *Petition*, p. 13. However, Petitioners attempt to remedy this infirmity by creating a theory under which the application of Washington's Growth Management Act ("GMA") to property with existing covenants should somehow give rise to the ability to re-litigate issues and claims already settled under the LUPA process. Such reasoning does not demonstrate sufficient public interest, and this Court should deny the *Petition*.

Petitioners' arguments do not demonstrate a public interest. The criteria to be considered in determining whether a sufficient public interest is involved are: (1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question

Petitioners request this Court's review.[3] Thus, even if this Court were to find credibility in Petitioners' assertion of the interplay of private contracts and the GMA creating a public issue, that issue would remain inapposite to this Court's review.

Finally, the Court of Appeals issued an unpublished opinion. No matter how well reasoned, unpublished opinions of the Court of Appeals lack precedential value, in part because they merely restate wll-established principles. *State v. Nysta* (2012) 168 Wash.App. 30, 275 P.3d 1162. as amended, *review denied* 177 Wash.2d 1008, 302 P.3d 180.

For these reasons, the GMA is not implicated by the underlying claim, and there is not public issue to be resolved.

ii. No authoritative determination is required to guide public decision-makers.

The Unpublished Opinion undertakes a commonplace collateral estoppel analysis and makes the unambiguous holding this final land use decisions has a preclusive effect, consistent with the Legislature's intent to

[3] "Each party also raises issues pertaining to their respective motions for summary judgment and the merits of the underlying claims. For instance, the appellants contend that the CCRs are unambiguous in that they clearly apply to all property within The Cedars. We decline to address these issues. First, we need not address these matters because we hold that the superior court properly dismissed this action. Second, the superior court made no ruling regarding these issues. Third, the record is insufficiently developed to address the merits even if we felt compelled to do so." *Avolio*, 2016 WL 6708089 at *15, FN 6,

define an exclusive jurisdiction and endpoint for land use decisions.[4] This provides clear guidance to the public decision-makers that their decisions are not subject to serial litigation. It also provides clear guidance to property owners and development opponents that the LUPA process is the venue under which land use decisions are determined, and that neither side gets a second bite at the apple by bringing serial actions litigating the same claims and issues. Had the roles of the parties been reversed and CG disagreed that the Hearings Examiner and Judge Gonzales lacked authority to consider the effect of the CC&Rs on a proposed subdivision, this Court can readily assume that Petitioners would cry out "Already Decided!" Further, such finality of land use decisions is consistent with the intent of LUPA, and allows a modicum of certainty regarding the ability to develop real property.

Conversely, attempting to identify and carve out an exception for some indeterminate set of land use decisions that can be subsequently re-litigated will cause confusion among local government decision-makers. Petitioners fail to clearly enumerate any bright-line rule for the exception to established preclusion law that they seek. This Court is faced with a

[4] "A party who either declines to challenge a hearing examiner's final order or who challenges a hearing examiner's decision by way of a LUPA petition and then declines to exhaust its right to appeal beyond the superior court may not then bring an entirely separate suit seeking a second determination of the same rights and remedies at issue during the earlier proceeding." *Avolio*, 2016 WL 6708089 at *8.

slim record and no evidence or briefing on the scope or consequences of creating some new category of land use decisions that are not final under LUPA. Thus, granting review of this case would only create unnecessary uncertainty amongst local government decision-makers.

iii. It is unlikely that this issue will recur.

There is no history of this issue having occurred. The Legislature adopted RCW 58.17.215 in 1987 and the GMA in 1990. Petitioners have failed to identify any example of private contractual rights being overridden by local zoning during the 27 years these two statures have supposedly been in conflict. This issue is not likely to recur or impact any significant number or people.

The *Petition* represents nothing more than the failure of Petitioners to prevail in prior proceedings and the decision of the Petitioners not to utilize the appeal rights available to them. Rather than do so, they instead seek to further frustrate the City's subdivision approval by re-litigating the very issue they told the City prevented the subdivision approval. Thus, this Court should deny the *Petition*.

D. Arguments on the Merits

Petitioners argue that the Unpublished Opinion improperly relies on parole evidence, and that the Hearing Examiner lacks competence to approve the subdivision of the Lots. These arguments do not address the

RAP 13.4 criteria for accepting review, but instead appear to be directed at the merits of the collateral estoppel. As such, this Court should disregard these arguments.

However, a brief discussion of these arguments is probative of their limited merit. Petitioners appear to argue that the parole evidence rule has been violated, yet identify no parole evidence relied on in any proceeding. This argument appears not to have been raised before the Court of Appeals. Petitioners' assertions about the inability of the Hearings Examiner to make land use decisions suffers from similar infirmities. Should Petitioners' be correct that only factual determinations under LUPA (and not legal determinations) are afforded preclusive value, then there would no longer be any finality of land use decision in the State of Washington. Any legal determination, such as compliance with a discretionary zoning code standard, would be subject to re-litigation in the courts. This is not the intent of LUPA.

IV. CONTINGENT CLAIMS

Should this Court accept Review, Respondent preserves the following claims which were made before the Court of Appeals.

- The sole jurisdiction for Petitioners' claim is under LUPA.

  The claim for declaratory relief is not consistent with LUPA

timing and filing requirements, thus the courts lack jurisdiction to hear the Petitioners' claim for declaratory relief.

- This Court should act in equity to award attorney fees to CG, due to the frivolous nature of the serial appeals by Petitioner, and Petitioners' attempt to avoid the attorney fees under RCW 4.84.370 by failing to appeal further under the LUPA process.

V. CONCLUSION

For the above-stated reasons, Respondent requests that this Court deny review of the Unpublished Opinion.

DATED: January 17, 2017. Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 17, 2017, I filed the foregoing *ANSWER TO PETITION FOR DISCRETIONARY REVIEW BY THE WASHINGTON SUPREME COURT* via electronic mail.

I further certify that on January 17, 2017, I served a copy of the foregoing *ANSWER TO PETITION FOR DISCRETIONARY REVIEW BY THE WASHINGTON SUPREME COURT* via electronic mail to the following party:

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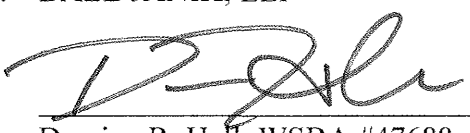

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