SUPREME COURT NO. 96741-5

COURT OF APPEALS, DIVISION II NO. 51091-0-II

SUPREME COURT
STATE OF WASHINGTON

BRETT AND KARA DURBIN
Petitioners,

v.

SUNRISE RIDGE/THE HIGHLANDS AT SOMERSET HILL HOMEOWNERS ASSOCIATION, a Washington Non-Profit Corporation, Respondent

v.

CITY OF TUMWATER, a Washington Municipal Corporation, Respondent

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ANSWER TO PETITION FOR REVIEW BY SUPREME COURT

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I. INTRODUCTION

The Court of Appeals decisions in, *Cave Properties v. City of Bainbridge Island,* 199 Wn. App. 651, 656, *411* P.3d 327 (2017) regarding LUPA and this honorable court's decision in *Snohomish County v. Pollution Control Hearings Board,* 187 Wn2d 346, 386 P.3d1064 (2016), regarding the vested rights doctrine, are neither inconsistent nor contradictory to the unpublished decision rendered by Division II below. Accordingly, discretionary review should be denied.

II. RESPONSE TO STATEMENT OF ERROR/ ISSUES PRESENTED

Petitioner's assignment of error mistakenly submits two points that are not supported by the record. First, Petitioners assert that there is no duty imposed upon the Vistas homeowners to maintain their own storm water facilities. Both SR/HSH conditions of plat approval and Vistas conditions of plat approval, however, impose a duty to maintain their own storm water facilities. The duty for each subdivision to maintain their storm water facilities is not mutually exclusive.

Second, there is no authority for the proposition that Vistas at Somerset Hills (Vistas) storm water maintenance responsibility is not subject to the Municipal Storm Water Ordinance after the plat was approved. Accordingly, the Tumwater Municipal Storm Water Ordinance applies to both Vistas and SR/HSH and they should be in compliance with

the ordinance by maintaining their own storm water facilities. TMC 13.12.020(D)(1).

III. STATEMENT OF THE FACTS

Jackson Development's application for plat approval of the Vistas subdivision was approved in 1991. A condition of plat approval required that the developer had to construct a storm water detention facility to serve the development. The developer was also required to acquire an easement for any offsite storm water facilities.

In July of 1992, Jackson Development granted to Hodges Homes a storm water drainage easement. The easement provided that Vistas would be responsible for the maintenance and repair of the storm water facilities. The easement was located on property that would later become part of the SR/HSH development.

Subsequently, the developer of Vistas constructed a storm water detention pond (Cell 2) on the easement granted to Vistas. The City approved the subdivision in early 1995.

A note on the face of the final plat for Vistas stated, "The storm drainage facilities located in the easement area are to be maintained by the homeowner's association as referenced in the maintenance agreement attached to the covenants. Clerks Papers (CP) at 108. The maintenance agreement noted that the developer had constructed storm water facilities

and required the developer and its successors to implement a "storm water facility maintenance program" which was attached to the agreement. CP at 248.

The SR/HSH development, which included the easement area provided to Vistas for their storm water easement, was completed in three stages between 2003 and 2006. The developer constructed storm water facilities for the SR/HSH subdivision in Vistas' easement area. The new SR/HSH storm water facilities were denominated Cells 1 (located on Lot "U") and Cell 3 (located on Lot "T"). Vistas storm water facility on Lot "T" was Cell 2 and is for the exclusive use of Vistas.

The first stage of the SR/HSH development was completed and approved by the City in July of 2003. A note on the face of the plat stated that storm water drainage facilities shall be maintained by the SR/HSH HOA as referenced in a maintenance agreement recorded with a specified auditor's file number. The maintenance agreement noted that the developer of the SR/HSH subdivision had constructed storm water facilities on what was referred to as Parcel B and required the developer and its successors to implement the storm water maintenance program.

The second stage of the SR/HSH development was completed and approved by the City in June of 2004. A note on the face of the plat, similar to the note on the phase one plat, provided that storm water

drainage facilities shall be maintained by SR/HSH HOA as referenced in the same recorded maintenance agreement.

The third and final phase III plat for the SR/HSH subdivision was approved by the city in May of 2006. On the face of the plat, it was also noted that storm water drainage facilities shall be maintained by SR/HSH HOA without specifying the ponds or storm facilities. The SR/HSH CC&Rs filed with the phase III subdivision did, however, state that the SR/HSH HOA was responsible for "all cost, expenses obligations and liabilities to preserve, repair, maintain, replace and restore… the Drainage Facilities (including the Ponds)." In 2010 the developer conveyed title to area where the storm water facilities and the Vistas' easement was located (i.e. Lots "U" and "T").

The City ordered the SR/HSH HOA to perform maintenance on the storm water drainage facilities as required by the storm water maintenance agreement in 2014. The SRS/HSH HOA, however, took issue with the City requiring the SR/HSH HOA to maintain Cell 2. Initially, the City acknowledged that the Vistas HOA had the sole maintenance responsibility for Cell 2 and required Vistas to maintain its facility. Subsequently, the City, however, assigned all responsibility for maintenance of all three cells to the SR/HSH HOA.

There is no factual basis for concluding that the Vistas plat was amended in order to relieve it of its duty to maintain its storm water facilities. The easement Vistas acquired from Jackson Development has not been relinquished or extinguished and Vistas still uses the easement for drainage. Finally, Vistas' storm water maintenance agreement with the City has not been rescinded.

IV. STATEMENT OF THE CASE.

SR/HSH HOA file a declaratory judgment action against the City of Tumwater. SR/HSH HOA requested a determination that it should not be responsible for paying the costs of maintenance and repair of Cell 2. The City brought a third-party claim against all of the owners of the lots in the Vistas development. Petitioners, Brett and Kara Durbin appeared in the trial court. The parties brought cross motions for Summary Judgment. The trial court granted the City/Durbin motion. The SR/HOA appealed the trial courts order on the City's Summary Judgment motion.

Division II of the Court of Appeals reverse the trial court and remanded the matter back to the trial court and directed the Court to apportion the responsibility for the maintenance and repair of Cell 2. Petitioners, Brett and Kara Durbin, filed their Petition for Review with the Supreme Court. The SR/HSH HOA is providing this Answer to the Durbin's Petition.

V. ARGUMENT OF LAW

A. LUPA applies only to land use decisions. If a party's claim is not based on an appeal of a land use decision, LUPA does not apply.

The Land Use Partition Act (LUPA) RCW 36.70.C was enacted in order to provide for appeals of land use decisions including subdivisions. The SR/HSH HOA is not interested in changing or amending any land use decision regarding conditions of plat approval. The SR/HSH HOA does, however, seek to enforce the terms of Vistas conditions of plat approval, storm water easement and water maintenance agreement.

Division II of the Court of Appeals dealt with the definition of a "land use decision" in *Cave Properties v. City of Bainbridge Island,* 199 Wn. App. 651,656, 401 P.3d 327 (2017). Citing RCW 36.70C.020(2) the court pointed out that a land use decision is "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination. Thus, the definition includes applications for project permits such as plats. RCW 36.70C(2)(a).

The SR/HSH HOA claims, however, do not challenge the conditions of the SR/HSH plat approval. The SR/HSH HOA 's claims, instead, center on Vistas' conditions of plat approval, storm water easement and maintenance agreement. SR/HSH asserts that Visas'

obligations are the basis of their claim that Vistas has an obligation to maintain their own storm water facilities. Thus, LUPA does not apply.

Conversely, Vistas HOA seeks to change their conditions of plat approval. Vistas HOA wants to modify the conditions of their plat approval by eliminating Vistas' duty to maintain its storm water facilities. Their position is inconsistent and their claim is barred by LUPA.

B. Completed developments are not exempt from all subsequent ordinances.

The petitioners assert that TMC 13.12.020(D)(1) does not apply to Vistas HOA because that provision was enacted in 2010, and that Vistas had a vested right to rely on storm water management rules in place at the time of its final approval in 1995. In support of their position the Petitioners cites *Westside Business Park, LLC v. Pierce County,* 100 Wn. App. 599, 5 P3d 713 (2000). Westside, however, is not a water pollution control case. Westside did involve storm water drainage requirements the County adopted "in part as a response to the Federal Clean Water Act." 100 Wn.App. 601. Pierce County, however, developed the requirements on its own rather than as a requirement imposed by the State through a municipal storm water permit. On that basis the Court in *Snohomish County v. Pollution Control Hearings Board,* 187 Wn.2d 346, 368, 386 P.3d 1064 (2016) found that Westside did involve a "land use control ordinance" and was therefore distinguishable. The Court noted in

rejecting reliance on Westside that the proper analysis for purposes of the vesting issue entails an examination of the source of authority for the requirement as well as its purpose.

The *Snohomish County* case involved applying new storm water regulations to the construction of projects that previously had been approved but which would not be started until a later date. *Snohomish County, Id,* at 353-354. The Court did not address completed developments like Vistas. Moreover, the Court did not hold that completed developments were exempt from all subsequent ordinances.

The court held that local ordinances adopted to implement federal and state storm water permit requirements are not "land use control ordinances" within the meaning of the vested rights statute. Therefore, local storm water ordinances adopted in order to be in compliance with state and/or federal mandates are not subject to the vesting statutes protections.

The Court concluded that "land use control ordinances" means only those ordinances adopted as a matter of local discretion. Thus, ordinances implementing state and/or federal mandates are not land use control ordinances and are not affected by the states vested rights statute.

The City of Tumwater's Storm Water Ordinance (TMC 13.12.010 et. seq.) specifically references the National Pollutant Discharge Elimination System (NPDES) permit program. See TMC 13.12.010 (P), TMC 13.12.020(B)(6) and TMC 13.12.020(G)(3)(b). The Storm Water Ordinance deals with point sources and the responsibility for maintenance and repairs of storm water systems and facilities. TMC 13.12.020(D). The Storm Water Ordinance is, therefore, adopted because of state and Federal mandates. The Ordinance is not implemented as a matter of local discretion. Accordingly, the ordinance is not a "land use control ordinance" and the vested rights doctrine does not apply to the ordinance.

The Tumwater Storm Water Ordinance applies to both the Vistas subdivision and the SR/HSH subdivision. The maintenance of each of the developments private storm water facilities should be enforced against the property served by the storm water facility. Clearly, only Vistas is served by Cell 2 and Vistas should be responsible for the maintenance and repair of Cell 2.

VI. CONCLUSION

The Court of Appeals decision that LUPA and the vested rights doctrine does not apply to this case is consistent with all precedent establish in the different division of the Court of Appeal and this Honorable Court's decisions. The issues presented by the petitioner are not unique. It is commonplace for residence of developments to want to avoid having to pay assessments. Nonetheless, the law is clear. Municipalities are required to enforce the conditions of plat approval. Moreover, municipalities are required to enforce their own ordinances. Vistas cannot avoid their responsibility for maintenance of their storm water facilities based upon the clear terms of the Tumwater Storm Water Ordinance and its own conditions of plat approval. The Petitioner's Petition for Review should be denied.

Respectfully submitted this 8th day of February, 2019.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on February 8, 2019, I electronically filed the foregoing document via email notification of such filing to all active parties on the case:

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