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No. 68739-5-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 the appellants in the Court of Appeals ("COA") decision.

II. DECISION WHERE REVIEW IS SOUGHT

Mangat v. Snohomish County ("Mangat II"), no. 68739-5-I (Wash. Ct. App., Div. 1, Aug. 26, 2013); attached hereto as Ex. A.[1]

III. ISSUES PRESENTED FOR REVIEW

1.) Whether the COA erred in *Mangat I* where it set precedent that the vested rights allow nonconforming uses of real property to "run with the land" from the date an application was complete, rather than at the time of plat is approved?

2.) If so, whether the doctrine of collateral estoppel bars the Mangats' extraordinary writs to compel or limit Snohomish County's exercise of authority to actions or omissions taken by the County, such that such actions or omissions did not result in an unconstitutional taking of their private property rights in violation of Wash. Const. art. I, §§ 3, 16 and U.S. Const. amends. V and XIV?

[1] Note that this matter was linked with *Mangat v. Snohomish County ("Mangat I")*, no. 67712-8-I, ___ Wn. App. ___, ___ P.3d. ___ (Wash. Ct. App., Div. 1, Aug. 26, 2013).

3.) If issue I above, is decided in favor of the *Mangats*, whether the COA erred in holding Mangats had no standing under LUPA?

IV. STATEMENT OF THE CASE

A. Statement of Facts.

The Mangats are developers, the appeal below arose out of their attempt to develop and purchase two contiguous pieces of property from its owners Respondents Luigi Gallo, and Johannes and Martha Dankers ("Gallo and Dankers"). (CP 182, 184). The parties intended that the Mangats submit an application to Respondent Snohomish County (the County)'s Planning and Development Services (PDS) and receive preliminary plat approval to subdivide the properties. (CP 182, 184, 188-89). In the event the Mangats defaulted on their attempt to purchase, the addendum required them to turnover "studies, reports, letters, memorandums, maps, drawings and other written documents prepared by surveyors, engineers, biologists, [***]".[2] (CP 182, 184, 188-89).

The Mangats filed a Master Permit Application ("Application"), and supplemental materials, with the County, for a subdivision project known as "Trombley Heights." (CP 88-91, CP 184-85, 194). The Mangats' application was deemed complete and "vested" on October 22,

[2] The parties dispute whether the terms include the application itself be turned over; or just the documents related to the application. The plain language of the contract does not state that the application itself, or rights thereunder, must be transferred from the developer to the landowner in the event of a default.

2007. (CP 111, 192, 194; Opening Brief of Appellants ("OB"), at Appendix 1 (SCC 30.70.040(2))). The Mangats incurred substantial costs associated with submission of their application, including application fees, extensions and consulting costs. (CP 184-85).

Considerable delay in permit processing occurred. In June, 2008 the County, through a PDS reviewer, apologised for their failure to begin promptly considering the Mangats' application (CP 194), but still **did not** set the for hearing on Mangat's' subdivision application within the 120 day countable timeline. (*See* CP 28-31; OB at 6-7).

Further, no notice of time limits being exceeded under SCC 30.70.110(5) was ever found to have been made. (*See* OB at 7; CP 110-154; *see also*, Snohomish County's Response Brief ("SnoCo RB") at 35-36, 44 (acknowledging no notice was sent and exceeding 120 days, but speculating that the application would not have been approved as it would not have received PDS recommendation); *but, see also*, CP 191-95).

Without preliminary approval of the plat application (see RCW 58.17.070), the Mangats were unable to secure financing, and after several extensions with Gallo and Dankers (*see* OB at 9-10), and a failure to agree on one more extension, the Mangats defaulted on December 16, 2009. (CP 185).

At this point a dispute arose over whether Gallo and Dankers received only the (a) "studies, reports, letters, memorandums, maps, drawings and other written documents prepared by [Mangat's experts and consultants]" and used to meet the conditions of the application under the contract; or, (b) the "vested rights" created by the application itself, which came into existence when the application was deemed "complete" by operation of law and County Ordinance (Snohomish County Code (SCC) § 30.70.040) on October 22, 2007. (OB at 9-10).

Before such dispute could be resolved (judicially or otherwise), the County allowed Dankers and Gallo to continue the plat application process started by the Mangats by stating Mangat's completed application "ran with the land" and thus could be enjoyed by the properties underlying landowners (*See e.g.*, CP 81-82, 95, 145, 155, 218-219). The County set the matter for hearing to secure approval before the Hearing Examiner. (CP 94-103).

The Mangats (first) filed suit to enjoin the County from making an approval and certain obtain declaratory relief. (*See Mangat v. Snohomish County ("Mangat I")*, No. 67712-8-1 (linked to this appeal); CP 463-64, 478-82). The injunctive relief initially obtained therein was vacated, and thereafter the Hearing Examiner approved the preliminary plat under the laws in effect in October 22, 2007. (CP 108-109, 296-306, 505-525).

Mangats appealed the Hearing decision to the Snohomish County Council, and were summarily dismissed. (CP 531-544). The final decision by the County to approve the project precipitated this second action under LUPA (Ch. 36.70C RCW, Ch. 64.40 RCW, and writs to protect 2007 vesting date secured pursuant to RCW 58.17.033 as a result of Mangat's application. CP 486-504

B. Proceedings Below.

Having obtained a final decision from the County Council, and exhausted their remedies, the Mangats were able to only the able to file the instant action. CP 486-504 (seeking review under LUPA, writs of Mandamus and Prohibition, and damages under RCW 64.40, *et. seq.*).

The respondents moved to dismiss the LUPA and Writ action. On the writ action, the superior court held Mangats were barred by collateral estoppel and *res judicata*. (CP 6, 462-476). On the LUPA action, the Court found the Mangat's lacked standing because Mangats had no interest in the real property, which was the subject of the application and, thus, were not aggrieved parties for purposes of standing under LUPA. (CP 6, 462-476). The Court dismissed these actions leaving only damages for delay and arbitrary and capricious conduct under Ch. 64.40 RCW. (CP 6, 270-72).

The Mangats then moved for partial summary judgment for failure of the County to timely process the application in 120 days. (CP 159-180). After hearing the matter, the trial court dismissed the case *sua sponte* on the grounds that Mangats were barred by the statute of limitations under RCW 64.40.030 and County's delay could not be said to be the proximate cause of their damages. (CP 8-9).

Mangats appealed to the Court of Appeals (COA). (*See* CP 11-12; Ex. A. at *3). The COA affirmed, holding: 1.) the Writs seeking to confine Snohomish County to its constitutional authority under the vesting rights doctrine, as limited by RCW 58.17.033, were precluded by application of collateral estoppel, (Exhibit A, p. 4-5); 2.) the Mangats had no standing under LUPA because they had no interest in the land itself or adjacent to it, (Ex. A. at 5-6); and, 3.) the Mangats' claims for damages under RCW 64.40 were time barred under the then recently decided *Birnbaum* and *Coy* cases. (*See* Ex. A at **7-9)(*citing*, *Birnbaum v. Pierce County*, 167 Wn. App. 728, 274 P.3d 1070, *review denied*, 175 Wn.2d 1018, 290 P.3d 994 (2012); *Coy v. City of Duvall*, 298 P.3d 134 (2013)).

V. AUTHORITY

A. Considerations for Granting Review.

A petition for review will 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; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (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(b). This appeal (linked with its companion case, *Mangat I*) involved, in pertinent part: writs for relief intended to either compel a process related to, or limit, conduct of Snohomish County. Specifically: the taking of Mangats' (the developers/applicants') vesting date pursuant to RCW 58.17.033, and the granting of such rights to Gallo and Dankers. Mangats alleged such was a violation of their due process rights under the Washington and United States Constitutions, as well as, the Eminent Domain provision of the Washington Constitution (*see* Ex. A at ** 1, 4-5. It also involved an interpretation of standing under LUPA that excluded Mangats (the original applicants) from challenging Snohomish County's constitutional authority in giving Mangat's vesting date secured pursuant RCW 58.17.033 to the landowner (*see* Ex. A at **1, 6).[3]

[3] "Because Khushdev and Harbhajen Mangat had no interest in real property owned by Johannes and Martha Dankers and Luigi Gallo, they had no standing to file a LUPA

Resolution of writ and LUPA issues decided herein will likely turn on this Court's resolution of the issues in *Mangat I.* Accordingly, the Mangats request this Court take judicial notice of Mangats' Petition for Review in that action and consider them here notwithstanding the general rule to the contrary because the cases are linked and application of the collateral estoppel doctrine requires a consideration of the issues raised in both cases. *See* infra. Thus, as shown below, the RAP 13.4(b) considerations meriting review in *Mangat I* also favor granting review of the issues here with respect to Writs and LUPA. *See* Petition for Review (*Mangat I*) at p. 1 (filed contemporaneously herewith).

B. Under this Court and Court of Appeals precedent collateral estoppel will not apply if this Court holds in *Mangat I* (*linked*) that Mangats owned the vesting date under RCW 58.17.033 because they owned the application.

The COA decision sets forth the elements necessary for the application of collateral estoppel. (Exhibit A, p. 4) The Mangats have no quarrel with the standards, but assert that ownership of the vested rights, including the 2007 vesting date, will be determined by this Court's ultimate resolution of the substantive issue argued in *Mangat I*; whether a completed land use application (which must be processed under the laws

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petition challenging the approval of the plat application subdividing the Dankers' and Gallo's real property [***] Mangats were not 'aggrieved or adversely affected' by the approval of the plat, and they had no standing under LUPA."
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in effect at the time of completion), and before any County approval, a personalty owned by its applicant,[4] i.e., a personal property right of the applicant/developer to the exclusion of others including the underlying landowner. *See* Petition for Review (*Mangat I*) at p.1 (filed contemporaneously herewith).

If this Court, as the ultimate judicial authority in Washington, finds Mangats' application is a right exclusive to them (i.e., it is intangible personalty, or *in personam*), than the Mangats writs for relief to protect their intangible personalty (including the choice to, or not to, consider it) from an unconstitutional taking by Snohomish County for the benefit of the landowners, Gallo and Dankers, was appropriate for mandamus or prohibition relief. *See* Wash. Const. art. 1, §§ 3 and 16; U.S. Const. amends. V, XIV; *see also, Valley View Industrial Park v. Redmond*, 107

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[4] Robert W. Semenow, *Questions and Answers on Real Estate*, 213 (Eighth Edition, Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1975):
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> [4]At the outset, it is important to remember that certain words and phrases in connection with real estate have a technical meaning and a different interpretation than is generally attributed to them by the average layman. The all-inclusive term "property" may be said to be the rights or interest which a person has in lands and chattels to the exclusion of all others. Blackstone defines land as comprehending all things of a permanent substantial nature. *Estate* means quantity of ownership, and *title* is the evidence of ownership. Estate stands for quantity and title refers to quality. Lands are *realty*; chattels are *personalty*. All property of whatever kind and description that is capable of being owned must fall into one of these two classes--realty or personalty. Realty, in turn, includes a twofold classification, *corporeal* realty and *incorporeal* realty. Personalty, likewise, may be divided into two groups, *tangible* (a desk) and *intangible* (copyright).

Wn.2d 621, 733 P.2d 182 (1987)(where a developer/owner sought (1) a writ of mandamus ordering the City to proceed with site plan review of its light industrial development in the Sammamish River Valley; (2) a declaration that the City's decision to change the zoning of its property from light industrial to agricultural use was an uncompensated taking that violated federal and state constitutions; and (3) damages and attorney's fees it incurred from the time of the zoning change).

The COA's decision otherwise, based on its own misapplication of RCW 58.17.033 in *Mangat I* violates Supreme Court authority which specifically considers the interaction of the two branches of government when interpreting this this statute. *See* Petition for Review (*Mangat I*) at 18-19 (discussion wherein COA refuses to look at the legislative history of the statute); *see, e.g., Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 277-78, 943 P.2d 1378 (1997) (*citing* to Final Legislative Report on bill enacting RCW 58.17.033 as part of its statutory construction of RCW 58.17.033); *cf.*, *Lauer v. Pierce County*, 173 Wn.2d 242, 259, 267 P.3d 988 (2011) (interpreting RCW as codifying, but limiting, vested rights doctrine applicable to subdivisions).

Further, if the COA is wrong about vested rights being real property running with land, instead of personal property belonging to applicant-developers, then its decision also violates numerous decisions of

this Court that no private property can be taken without complying with Wash. Const art. I, § 16 and those statutes enacted pursuant to its mandates. *See e.g.*, *Kershaw Sunnyside v. Interurban Lines*, 156 Wn.2d 253, 126 P.3d 16 (2006); *State v. Bergh*, 64 Wn.2d 628, 393 P.2d 293 (1964); *State ex rel. Eastvold v. Yelle*, 46 Wn.2d 166, 279 P.2d 645 (1955); *State ex rel. Decker v. Yelle*, 191 Wash. 397, 400-402, 71 P.2d 379 (1937).

Similarly, the COA's LUPA analysis must necessarily change if this Court determines the Mangats owned the vesting date accompanying their 2007 completed application and it was unconstitutionally taken from them and given to the landowners. The COA's decision denying Mangat's standing to raise the constitutionality of the County giving the vesting date accruing to their application to Gallo and Dankers goes against the language of LUPA and this Court's recent decision in *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013) ("LUPA authorizes the courts to grant relief in six instances, including cases where a land use decision violates a party's constitutional rights." (*citing*, *Lauer*, 173 Wn.2d at 252; RCW 36.70C.130(1)(f)).

If the Mangats owned the vesting date, as an incident to their ownership of the application then they were aggrieved applicants within the meaning of LUPA. RCW 36.70C.060. This is because ownership of

the application would give the Mangats, as developer-owner of the permit, the right to exclude Gallo and Dankers from possessing their application, as Mangats own their application and all rights relating thereto. *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 364, 13 P.3d 183 (2000) (collecting cases regarding the right to exclude other from property). The Mangats wanted to exclude Gallo and Dankers from obtaining their vesting date. *See* CP 490-92, (complaint). Further, Snohomish County would have had no authority to give this property to other private persons unless it complied with Ch. 8.80 RCW. *See* cases cited supra, pp. 11-2. *See also State ex rel. Peel v. Clausen*, 94 Wash. 166, 162 Pac. 1 (1917).

Assuming, for the sake of argument, that the Mangats ability to prevent Gallo and Dankers from platting the development project is too abstract and is now moot, the issue of an unconstitutional taking of private property is not because the Mangats are still be entitled to damages from Snohomish County for seizing the subject matter of the dispute between applicant and landowner, without process or just compensation. *See Lakey*, 176 Wn.2d 909.

Further, a recognized exception to this general rule of mootness lies within the court's discretion when "matters of continuing and substantial public interest are involved." *See Sorenson v. Bellingham*, 80

Wn.2d 547, 558, 496 P.2d 512 (1972); *see e.g., Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 54, 615 P.2d 440 (1980); *In re Bowman*, 94 Wn.2d 407, 411, 617 P.2d 731 (1980); *In re Wilson*, 94 Wn.2d 885, 887, 621 P.2d 151 (1980); *Leonard v. Bothell*, 87 Wn.2d 847, 848, 557 P.2d 1306 (1976); *Washington State Comm'l Passenger Fishing Vessel Ass'n v. Tollefson*, 87 Wn.2d 417, 419, 553 P.2d 113 (1976). As the County explained at oral argument, the issue of whether a vesting date obtained pursuant to the filing of a subdivision application is *in personam* or *in rem* is a matter of substantial public importance, likely to recur in these harsh economic times.[5] This is sufficient in and of itself, under Washington law to allow review of moot questions; and constitutes a matter of substantial public importance (RAP 13.4(b)(4)) justifying this Court's review of the COA's decision.

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[5] During oral argument, the lead attorney for Snohomish County indicated the issue decided and being appealed in Mangat I and upon which resolution of this appeal must turn was an important public issue about which municipalities needed guidance.

> [5] [***] 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. [***]

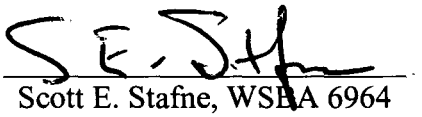
[5]Audio file of COA oral argument at 19:07-19:35.

VI. CONCLUSION

Based on the foregoing, this court should grant the petition and accept review of the Aug. 26, 2013, *Mangat II*, no. 68739-5-I decision.

Respectfully Submitted this 24th day of September, 2013, by:

STAFNE TRUMBULL, LLC



Scott E. Stafne, WSBA 6964
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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 the above Petition for Discretionary Review on Respondents' attorneys by giving a copy of that document to ABC Legal Messenger Service for delivery to the following individuals:

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DATED this 24th day of September, 2013, in Arlington, Washington,

By:

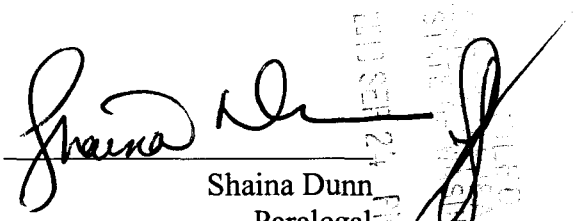

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EXHIBIT A

***Mangat v. Snohomish County ("Mangat II")*, no. 68739-5-I**
(Wash. Ct. App., Div. 1, Aug. 26, 2013).

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

KHUSHDEV MANGAT and HARBHAJEN 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. 68739-5-I/Linked w/67712-8-I DIVISION ONE UNPUBLISHED OPINION FILED: August 26, 2013

SPEARMAN, A.C.J. — Because Khushdev and Harbhajen Mangat had no interest in real property owned by Johannes and Martha Dankers and Luigi Gallo, they had no standing to file a LUPA petition challenging the approval of the plat application subdividing the Dankers' and Gallo's real property. Additionally, the Mangats' writs of prohibition and mandamus seeking to enjoin approval of the plat application are barred by collateral estoppel. Finally, the Mangats' claim for damages under chapter 64.40 RCW for failure to timely act on an application for a permit is barred by the statute of limitations. We affirm the trial court.

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 (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. That case was dismissed on summary judgment, and the appeal of that order, No. 67712-8-I, is linked with this appeal.

On May 11, 2011, a hearing examiner held a hearing on the plat application. On May 17, the hearing examiner entered a decision granting approval of the plat application. The Mangats filed an "appeal" of the hearing examiner's decision to the Snohomish County Council (Council). The Dankers and Gallo moved for dismissal of the appeal, and the Council granted dismissal on June 15, 2011.

On July 5, 2011, the Mangats filed 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 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 the subject of this opinion.

DISCUSSION

The Mangats' petition challenged the decisions of the hearing examiner and the Council under LUPA, and it also alleged three causes of action: (1) an application for a writ of mandamus under RCW 7.16.160 compelling the County to rescind its decision permitting the Dankers and Gallo to continue with the plat application; (2) an application for a writ of prohibition under RCW 7.16.160 prohibiting the County to permit the Dankers and Gallo to continue with the plat application; and (3) an action for damage against the County for untimely processing of the application under ch. 64.40 RCW. We affirm summary judgment dismissal of these claims.

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

Writs of mandamus and prohibition. The County argues the Mangats' applications for writs of mandamus and prohibition are barred by collateral estoppel. We agree.

Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties and is distinguished from claim preclusion, or res judicata, in that instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted. Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 306, 96 P.3d 957 (2004).

For collateral estoppel to apply, the County, as the party seeking application of the doctrine, must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. Christensen, 152 Wn.2d at 307. Whether collateral estoppel applies is an issue of law that we review de novo. Id. at 305.

Here, all four elements weigh in favor of application of collateral estoppel. The applications for writs of mandamus and prohibition against the County presents an issue identical to that already decided in the first lawsuit: whether the County should be enjoined from processing the plat application. Additionally, the request for injunctive

relief in the first lawsuit ended in a judgment on the merits against the Mangats, who were parties to the litigation. Finally, application of collateral estoppel does not work an injustice on the Mangats, given they fully litigated the issue of injunctive relief against the county in the other proceeding. As such, summary judgment dismissal of the applications for writs of mandamus and prohibition was proper and we affirm.

LUPA challenge to decisions of hearing examiner and County Council. The County argues the Mangats do not have standing under LUPA to challenge the decisions of the hearing examiner and the County Council. We agree.

LUPA governs judicial review of Washington land use decisions. HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning and Land Servs., 148 Wn.2d 451, 467, 61 P.3d 1141 (2003). With certain exceptions, LUPA provides the "exclusive means of judicial review of land use decisions. . . ." RCW 36.70C.030(1). A person, other than the owner whose property is the subject of the land use decision, has standing to bring a petition under LUPA if that person is or would be "aggrieved or adversely affected" by the decision. RCW 36.70C.060(2). The Mangats' petition sought review under RCW 36.70C.060(2), alleging they were aggrieved or adversely affected persons.

A person is "aggrieved or adversely affected" for purposes of LUPA "only when all of the following conditions are present": (1) the person is prejudiced or likely to be prejudiced by the decision; (2) the local jurisdiction was required to consider that person's asserted interests in making its decision; (3) a favorable judgment would redress or substantially eliminate the prejudice; and (4) the person has exhausted her

administrative remedies. RCW 36.70C.060(2); Lauer v. Pierce County, 173 Wn.2d 242, 253-54, 267 P.3d 988 (2011).

None of these conditions are applicable to the Mangats. When the Mangats defaulted under their purchase and sale contracts with the Dankers and Gallo, they 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 was at that point nothing left for the Mangats to own, and they no longer had any interest in the land being subdivided. As we held in our opinion of the Mangats' other appeal, "the Mangats had no interest, prospective or otherwise, in the Dankers' or Gallo's properties." As such, the County had no obligation to consider the Mangats' asserted interests in deciding whether to approve the plat application, and the Mangats suffered no prejudice from the subdivision. In other words, the Mangats were not "aggrieved or adversely affected" by the approval of the plat, and they had no standing under LUPA.

Claim for damages under chapter 64.40 RCW. The County argues the trial court properly dismissed the Mangats' claim for damages under chapter 64.40 RCW because it was time barred. We agree.

Chapter 64.40 RCW sets forth a cause of action for owners of a property interest who have filed an application for a permit where an agency fails to act on the permit in a timely fashion:

> Owners of a property interest who have filed an application for a permit have an action for damages to obtain . . . relief from a failure to act within time limits established by law . . . .

RCW 64.40.020(1). Here, the Mangats claimed the County failed to act on the permit within the 120 day time period established by RCW 36.70B.080(1) and Snohomish County Code (SCC) 30.70.110. The County admits it failed to act on the application within the 120 day time period, which expired in June 2008. The County argues, however, that the Mangats' failure-to-act claim is barred by the following 30-day limitation period set forth in the statute:

> Any action to assert claims under the provisions of this chapter shall be commenced only within thirty days after all administrative remedies have been exhausted.

RCW 64.40.030.

We agree with the County. Birnbaum v. Pierce County, 167 Wn. App. 728, 274 P.3d 1070, review denied, 175 Wn.2d 1018, 290 P.3d 994 (2012), a recent decision by this court, is instructive on this issue. In that case, the plaintiff submitted an application for a conditional use permit to build a recreational vehicle park and campground in 2005, but the hearing examiner did not approve the permit until 2010. Birnbaum, 167 Wn. App. at 734. We noted that according to the plain language of RCW 64.40.030 any action asserting "claims under the provisions of this chapter shall be commenced only within thirty days after all administrative remedies have been exhausted." Because it was undisputed there was no adequate administrative remedy, we concluded that the statute of limitations commenced when the 120 day time limit was exceeded. We then

held that Birnbaum's claim was time barred because it was beyond dispute that more than thirty days had passed since the County had failed to act on the permit in 2005.

The Mangats' attempt to distinguish Birnbaum by claiming that their appeal to the county council of the hearing examiner's decision granting the plat application was an administrative remedy for their delay claim. Thus, they contend that the limitations period did not commence until the county council denied their appeal on June 15, 2011. The contention is without merit. Chapter 64.40 RCW does not set forth any administrative remedies for failure to timely process a permit application. Moreover, the Mangats cite no authority for their proposition that an appeal to the Council is an administrative process designed to deal with claims for failure to timely process permit applications. The decision of the Council was simply a review of the plat application, not an administrative remedy for failure to timely process. As was the case in Birnbaum, "the limitations period began when the 120 day time limit was exceeded." Birnbaum, 167 Wn. App. at 734. Here, that limit was exceeded in June 2008, and the Mangats' claim therefore expired before they filed suit in July 2011.[2]

The Mangats next argue the thirty-day statute of limitation should have been tolled because the County failed to comply with SCC 30.70.110(5), which requires the

[2] The Mangats also argue they have a claim for damages under RCW 64.40.020 for the County's inaction in processing the application, which they describe as an "arbitrary delay" that fits within the "final decision" prong of the statute. There is no cause of action, however, for arbitrary delay under that prong of the statute, and we reject the argument. See Birnbaum, 167 Wn. App. at 737; Coy v. City of Duvall, __ Wn. App. __, 298 P.3d 134 (2013). Additionally, we decline the Mangats' invitation to depart from Birnbaum.

County to notify a permit applicant in writing if the County fails to act on the permit in a timely fashion:

> The county shall notify the applicant in writing if a notice of final decision on the project has not been made within the time limits specified in this section. The notice shall include a statement of reasons why the time limits have not been met and an estimated date of issuance of a notice of final decision.

SCC 30.70.110(5). But nothing in the plain language of this provision addresses tolling a cause of action under chapter 64.40 RCW for failure to timely act on a permit, and the Mangats cite no other authority in support of their argument. Nor do they contend that their failure to timely file a claim against the County occurred because the County did not provide the notice required in the ordinance. Moreover, the Mangats do not dispute that they were well aware of when the time for the County to act on their application had exceeded 120 days.[3] As we stated in Birnbaum, the onus of keeping track of when the 120 day time limit for failure of the County to act is upon the applicant. Birnbaum, 167 Wn. App. at 734, n.1. We reject the Mangats' arguments on this issue, and affirm dismissal of the claim.

Attorney fees on appeal. The Dankers and Gallo, along with the County, both request an award of attorney fees on appeal under RAP 18.1 and RCW 4.84.370, which provides for reasonable fees and costs incurred in appeal of a decision relating to development permits:

[3] It is undisputed that in filing the application, the Mangats were assisted by a consultant who had worked as a senior planner for Snohomish County for 18 years, and by his own declaration, was familiar with the running of the 120 day time period.

> (1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:
>
> > (a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline hearings board; and
> >
> > (b) The prevailing party[s] on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.
>
> (2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

RCW 4.84.370.

The County, the Dankers, and Gallo substantially prevailed in this appeal, which is about approval of a plat application, and both prevailed at the trial court. Additionally, the Mangats failed to respond to this issue in their briefing. As such, we award reasonable fees and costs to both the County and to the Dankers and Gallo.

Affirmed.

Specroman, A.C.J.

WE CONCUR: