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No. 99236-3

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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NOCHE VISTA, LLC,  
a Washington limited liability company,

Petitioner,

v.

BANDERA AT BEAR MOUNTAIN RANCH  
HOMEOWNERS ASSOCIATION, a Washington  
Nonprofit Corporation,

Respondent.

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*AMICI CURIAE* MEMORANDUM  
IN SUPPORT OF GRANTING REVIEW

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A. INTRODUCTION

Division III's opinion is deeply troubling because it purports to address fundamental property issues involving the powers of grantors of subdivisions, and the effect of deeds in lieu of foreclosure in unusual ways.

B. IDENTITY AND INTEREST OF *AMICI CURIAE*

The identity and interest of *amici curiae* are set forth with particularity in the motion for leave to file this memorandum.

C. STATEMENT OF THE CASE

Division III of the Court of Appeals issued an opinion that contains three highly questionable treatments of Washington real estate law that should be addressed by this Court.

First, the court concluded that the rights of a grantor, the developer of a subdivision do not "run with the land." Op. at 17-18. Ordinarily covenants "run with the land," that is, they follow the ownership of the property. Thus, if a subdivision owner sells the subdivision, or a homeowners association assumes managerial responsibilities as individual lots are sold, the covenants continue to apply. Under the decision, the grantor's rights are personal to the grantor and do not "run with the land." Theoretically, the grantor may affect the subdivision even if it is sold or individual lots are sold.

Second, Division III ruled that a deed in lieu of foreclosure to a

lender does not convey the developer/grantor rights to a lender. Lenders expect that they are receiving *all* of the borrower/developer/grantor's rights by such a deed.

Finally, the court determined that a grantor's amendment of the CC&Rs that did not *expressly* annex certain land to the subdivision as the CC&Rs require, constituted an effective "annexation" even though the CC&Rs' provisions on annexation were not invoked.

#### D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

*Amici* ask this Court to grant review because Division III's determination that a transfer of title under a deed in lieu of foreclosure may not transfer all of the rights of a grantor and, as a corollary, that a grantor under such a deed may have retained the right to control how the conveyed property is developed in the future is extremely problematic. Division III's treatment of these important questions is superficial. NCWAR/BNCW's view of these rulings, which it believes would be shared by lenders who receive title to collateralized real property utilizing such a deed following a default, is that Division III's rulings are contrary to the most fundamental principles of real property ownership by which the *amici's* members structure and conduct their practices.

On the question of whether a grantor's rights are personal or run with the land, this Court, not Division III, should be the final word on

whether that is the rule for Washington property law. Division III's analysis of this important question was brief. The authorities upon which it relied, *op. at 17-18*, often arose in the context of *preventing* a grantor's successor from exercising what were obviously rights special to the grantor alone. *See, e.g., Diamondhead Country Club & Prop. Owners Ass'n v. Peoples Bank*, 296 So. 3d 651 (Miss. 2020) (developer exemption from HOA fees); *Scott v. Ranch-Roy-L, Inc.*, 182 S.W.2d 627 (Mo. App. 2005) (question of fact as to whether developer/grantor effectively assigned rights in action by landowners to prevent development by corporate assignee).

Simply put, grantors should not have the ability to control a subdivision or stymie a subdivision's development by the exercise of what amounts to "dead hand control" through an alleged "personal" right. This kind of authority, exercised perhaps *years* after the grantor relinquished control over the subdivision, is fraught with problems and opportunities for mischief. For example, NCWAR's members sell properties in subdivisions. How can they or their clients, both buyers and sellers, know if a grantor has retained the right to amend the covenants in a subdivision if the grantor's right is personal and do not run with the land or otherwise appear in the chain of title? How long does that personal right persist?

Even if the grantor's rights were personal only, this Court should determine if they are assignable and the effect of a deed in lieu of

foreclosure on such grantor rights. Courts have recognized that grantors must have the ability to convey rights in connection with subdivisions. *See, e.g., Bd. of Managers of Medinah on the Lake Homeowners Ass'n*, 692 N.E.2d 402 (Ill. App. 1998); *Hughes v. New Life Development Corp.*, 387 S.W.3d 453 (Tenn. 2012). Indeed, in *Peoples Federal Savings & Loan Ass'n of S. Carolina v. Resources Planning Corp.*, 596 S.E.2d 51 (S.C. 2003), the court held that a bank that successfully bid for property at a foreclosure sale acquired developer rights at the sale. Clearly, lenders in Washington contemplate that they receive all valuable rights, including the grantor's rights, when they receive a deed in lieu of foreclosure on the property.

This Court should decide the ultimate effect of deed in lieu of foreclosure and the assignability of grantor rights.

Finally, as to whether annexation can occur within the meaning of the CC&Rs is a question for this Court. Annexation provisions in CC&Rs are not unusual. Article 10 of the CC&Rs here addressed annexation. Such a significant action should be undertaken expressly so that all affected property owners or those with interests in the property can know annexation has occurred.

Division III's rulings, if allowed to stand, would introduce profound uncertainties and confusion into every transaction where a deed in lieu of

foreclosure is somewhere in the chain-of-title because of the potential that someone who has lost property to a lender may assert, as was asserted in this case, that he may yet control how property is developed. How can NCWAR's members market properties with any confidence or BNCW's members build on such properties with any confidence unless the rules are clear? Given the *amici's* high standards of professionalism, the impact which Division III's rulings would have on the plans and expectations of those who acquire such property is of paramount concern to *amici*, but so, too, is the potential for liability on the part of its members dealing with property whose chain-of-title includes a transfer by deed in lieu of foreclosure.

The practice of NCWAR's members and other real estate agents is inextricably intertwined with the law of real property ownership and conveyancing. This is also true for BNCW's members. Those persons are not lawyers, but the sensitivity they must exercise to the legal principles which undergird the law of property ownership and conveyancing suggests to *amici* that Division III's rulings, if allowed to stand, would cause significant disruptions both in their members' practices and in the conveyances involving collateralized real property. *Amici* foresee the potential for significant disruptions in the title industry which is so crucial to real property development. All told, the uncertainty and confusion which



Division III's opinion would introduce into all facets of the real property development community would have a profoundly chilling effect both on that community as well as, by extension, on the broader communities on whose financial health the success of real property development is dependent.


E. CONCLUSION


In all, Division III's opinion is exceedingly problematic for anyone concerned with clear cut rules for property transactions involving subdivisions with CC&Rs. *Amici* urges this Court to grant review. This Court has an important responsibility to see that Washington property law is clear and consistent. Review is merited. RAP 13.4(b).

RESPECTFULLY SUBMITTED this 19th day of January, 2021.

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## CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2021, I electronically filed the foregoing with the Clerk of the Court using the Washington State Appellate Court's Portal electronic filing System. Notice of this filing will be sent to the parties listed below by operation of the Court's e-filing system. Parties may access this filing through the Court's system.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

SIGNED and DATED at Wenatchee, Chelan County, Washington,  
this 19th day of January, 2021.

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