

NO. 38394-2-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

LUIS FLORES,

Appellant,

vs.

BRADLEY C. HOGGATT, et ux.,

Respondent,

APPEAL FROM THE SUPERIOR COURT

HONORABLE JAMES WARME

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

The trial court erred by granting the Order on Plaintiffs' Motion for Summary Judgment.

ISSUES PRESENTED

1. Did the trial court abuse its discretion by granting injunctive relief in this matter?
2. Did the Hoggatts have a clear legal or equitable right entitling them to injunctive relief?
3. Can a court order local agencies to ignore their own subdivision regulations?

STATEMENT OF THE CASE

The facts underlying the issues presented in this appeal are not subject to serious dispute.

In 2004, Luis Flores purchased property located at 6933 Old Pacific Highway, South, Kalama, Washington, from Bradley and Connie Hoggatt for \$249,900.00. The Hoggatts conveyed the property to Mr. Flores by a Statutory Warranty Deed recorded on April 30, 2004. (CP 24, 27-29) The property was part of a larger parcel. The Hoggatts did not subdivide the property before they conveyed it to Mr. Flores. (CP 32, 39)

In 2007, Mr. and Mrs. Hoggatt wanted to develop the remainder of the parcel. They asked Cowlitz County to grant them a variance from road frontage requirements. Their application brought to light the fact that they had conveyed property to Mr. Flores without complying with local subdivision requirements. (CP 25, 31-43)

During the application process, Mr. Hoggatt stated that he intended to build one single-family residence and possibly a recreational vehicle garage on the remainder of the property. He also stated that he would not seek to create more than one lot from the balance of the land. (CP 52) The Hearings Examiner allowed the variance but required Mr. Hoggatt to subdivide the property in accordance with Cowlitz County regulations. (CP 36-43) Mr. Flores learned that the property had not been properly subdivided during the Hoggatts' request for a road frontage variance. He was understandably concerned that he had paid a substantial amount of money for a parcel of land that had not been lawfully created. (CP 25)

The Hoggatts sought to begin the subdivision process in early 2008. The property to be subdivided included the parcel conveyed to Mr. Flores as well as the remainder of the property. Mr. Flores wanted to make sure that the process proceeded in a reasonable fashion. He wanted Mr. Hoggatt to adhere to the pledge he had previously given to Cowlitz County — that the subdivision would only create two lots. He asked the

Hoggatts to enter into a covenant prohibiting further division for a period of twenty-five (25) years. He also requested that the parcels be surveyed. Mr. Hoggatt would not agree to Mr. Flores' requests. (CP 46-47)

Cowlitz County regulations require that all property owners sign and submit an application to subdivide property. Mr. Flores did not authorize the filing of the application because Mr. Hoggatt would not agree to the requests Mr. Flores had made concerning the proposed division. (CP 46-47)

The Hoggatts filed suit on May 13, 2008. They alleged that Cowlitz County required the subdivision application to be signed by both themselves and Mr. Flores. They also conceded that the parties had not been able to agree on certain aspects of the division. Finally, they alleged that Mr. Flores would not allow the filing of the application in the absence of agreement. They sought "affirmative injunctive relief" requiring Mr. Flores to sign the subdivision application. (CP 3-6)

Mr. Flores answered the complaint. He admitted the factual allegations relating to the history of the dispute of which he had knowledge. He also counterclaimed for rescission or damages pursuant to RCW 58.17.210 on account of the Hoggatts selling him a parcel of land in violation of Cowlitz County subdivision requirements.

The Hoggatts moved for summary judgment. (CP 10) The asked the Court to enter an order requiring Mr. Flores to sign the subdivision application. Mr. Flores responded by stating that he was under no statutory or contractual obligation to do so. (CP 15-22)

The trial court orally ordered Mr. Flores to authorize the filing of the subdivision application. It stated that it would authorize the filing of the application without his signature should he fail to comply. When Mr. Flores refused, the trial court entered the Order on Plaintiffs' Motion for Summary Judgment on September 29, 2008. The order required Cowlitz County to accept the signature of only the Hoggatts on both the subdivision application and any final plat. (CP 53-5)

Mr. Flores then appealed. (CP 56-59)

ARGUMENT

I. Standards for Review.

a. Standard for Review of a Grant of Summary Judgment.

This matter was decided on summary judgment. An Appellate Court must review this order *de novo*, making the same inquiry as would the trial court. It must determine whether the pleadings, depositions, admissions on file, and affidavits show whether there is any genuine issue of material fact and view those facts in the light most

favorable to the nonmoving party. If there is no genuine issue of material fact, the Court must establish that the moving party is entitled to judgment as a matter of law. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005); *Fidelity & Deposit Co. of Maryland v. Dally*, 148 Wn.App. 739, 743, 201 P.3d 1040 (2009).

A court's inquiry, therefore, consists of two parts. First of all, it must find that the party seeking summary judgment has demonstrated the absence of any genuine issue of material fact. Secondly, it must ascertain whether that party has shown entitlement to relief based upon those facts. *Tegland Rules Practice* 4 Wash.Prac. CR 56, comments 1, 22.

The Court is not limited to granting summary judgment to the moving party. If the facts are undisputed and the nonmoving party is entitled to relief, a court may grant summary judgment to the nonmoving party. *Impecoven v. Department of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992).

The facts are substantially agreed in this case. However, the Hoggatts are not entitled to the relief that they seek. For that reason, the trial court erred by allowing them summary judgment. Rather, it should have granted summary judgment to Mr. Flores.

b. Standard for Grant of Injunctive Relief.

As their complaint states, the Hoggatts sought injunctive relief in this matter. A party requesting injunctive relief must show each of the following elements:

1. A clear legal or equitable right;
2. A well grounded fear of immediate invasion of that right by the one against whom the injunction is sought; and
3. That the acts complained of are either resulting in or will result in actual and substantial injury.

Tyler Pipe Industries, Inc., v. Department of Revenue, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982); *Kucera v. Department of Transportation*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000).

The first of these three requirements is critical. The party seeking an injunctive relief must have a clear legal right. An injunction will not issue in a doubtful case. *Isthmian S.S. Co. v. National Marine Engineers' Beneficial Association*, 41 Wn.2d 106, 117, 247 P.2d 549 (1952); *Tyler Pipe Industries, Inc., v. Department of Revenue*, *supra*, 96 Wn.2d at 793; *Kucera v. Department of Transportation*, *supra*, 140 Wn.2d at 209.

In this case, the trial court granted injunctive relief to the Hoggatts. The appellate court reviews a trial court's decision to grant an

injunction for abuse of discretion. Such abuse is made out when the trial court bases its decision on untenable grounds or reasons or when the decision is manifestly unreasonable. *Washington Federation of State of Employees, Council 28, AFL-CIO v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983). The decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard or if the facts fail to meet the requirements of the correct standard. *Washington Federation of State of Employees, Council 28, AFL-CIO v. State, supra*, 99 Wn.2d at 887; *Bauman v. Turpen*, 139 Wn.App. 78, 92, 160 P.3d 1050 (2007). A decision is based on untenable reasons if the trial court applies the wrong legal standard or adopts an erroneous view of the law. *Gildon v. Simon Property Group, Inc.*, 158 Wn.2d 483, 494, 145 P.3d 1196 (2006); *Bay v. Jensen*, 147 Wn.App. 641, 651, 196 P.3d 753 (2008).

As will be shown below, the Hoggatts have no clear legal or equitable right to the relief they have requested. For that reason, the trial court abused its discretion by granting them injunctive relief.

II. The Statutory and Regulatory Schemes Require All Property Owners to Sign the Subdivision Application and Final Plat.

The legislature provided for subdivision of land in RCW 58.17. Provisions of that chapter are general in nature. The legislature left the

specifics of the application of the approval process to local governmental agencies. RCW 58.17.033; RCW 58.17.060(1).

The subdivision statute describes two types of subdivisions, which are commonly referred to as “subdivision” or “long subdivision” on the one hand and “short plat” or “short subdivision” on the other. A “short subdivision” is distinguished from a “long subdivision” by the number of lots into which the property can be divided. A “short subdivision” is a division of land into four or fewer lots. A local agency may utilize the short subdivision procedure to allow divisions into nine or fewer lots within an urban growth area. RCW 58.17.020(6); RCW 58.17.060(1).

Cowlitz County’s subdivision ordinance is CCC 18.34.¹ The ordinance allows for approval of short subdivisions. The process begins by the submission of an application. CCC 18.34.060(A). Cowlitz County has mandated what information the application must contain. It provides:

The preliminary application shall be in a form provided by the Administrator and shall contain the following information:

1. The name, address, and telephone number of the owner;
2. The name, address, and telephone number of the developer if different from the owner;

¹ “CCC” refers to Cowlitz County Code.

3. A certification by the owner showing the entire contiguous common ownership of land in which there is an interest by reason of ownership, contract to purchase, earnest money agreement, or option by any person, firm, or corporation in any manner connected with the development, and the names, addresses, and telephone numbers of all such persons, firms, or corporations; . . .

7. The signature of owner(s) and developer(s).

CCC 18.34.060(B). By setting these requirements, Cowlitz County made it clear that it wants to know the identity of each person who has any interest in the property and the nature of that interest. By asking for signatures of all owners and developers, it wants to ensure that everyone with an interest in the property approves the application.

The regulation allows the planning director to approve a preliminary short subdivision after filing of the application is submitted. CCC 18.34.100(A). Thereafter, the applicant must prepare and file a final plat. CCC 18.34.150. The final plat must also bear the signatures of all individuals having an interest in the property being subdivided. Cowlitz County requires owners and developers to sign the final plat in the following language:

The final plat shall be in black on a sheet of mylar have dimensions of 18 by 24 inches. Forms for this shall be available through the Department. The plat shall contain, but not be limited to the following:

10. Signatures, which are certified by a notary public, of all individuals having an interest in the property.

CCC 18.34.060(C)(10). Once again, the signature requirement ensures that all property owners are approving the platting of the property and the final plat.

One other aspect of Cowlitz County's regulatory scheme is critical. The ordinance contains no provision requiring an owner of property to sign a subdivision application or a final plat under any circumstance. Persons owning property are free not to subdivide and are free to abandon the application after it has been filed.

III. The Hoggatts Have No Right to Relief.

There is nothing in RCW 58.17 or CCC 18.34 that could compel Mr. Flores to execute a short subdivision application or a final plat. There is also no contract between the Hoggatts and Mr. Flores that would require Mr. Flores to allow a short subdivision process to go forward.² In the absence of any statute or contract allowing the Hoggatts the right to compel Mr. Flores to join the subdivision process, they have no right to require him to do so.

² Developers often purchase property they intend to subdivide. When they do, the purchase and sale agreement with the seller typically requires the seller to cooperate in a subdivision process. It will also allow for the closing of the transaction when the developer has obtained a preliminary plat. If the developer does not obtain a preliminary plat, it may now withdraw from the transaction, and, possibly, to recover any earnest money that has been tendered. There is no such contractual provision in this case.

Furthermore, by its terms, CCC 18.34.060 requires the signatures of all property owners. In that regard, the rules of construction of municipal ordinances are the same as those for state statutes. *City Spokane v. Fischer*, 110 Wn.2d 541, 542, 754 P.2d 1241 (1988); *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 392, 816 P.2d 18 (1991). In construing statutes, a court first looks to the statute's plain meaning to determine whether it is ambiguous. If it is not ambiguous, its plain meaning must be given effect. *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002); *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). The language of CCC 18.34.060(B)(7) and CCC 18.34.060(C)(10) are not ambiguous. The statute states the need for the signature of owners by use of the word "shall." The use of the word "shall" creates a mandatory duty. *Roberts v. King County*, 107 Wn.App. 806, 816, 27 P.3d 1267 (2001); *Smith v. City of Kelso*, 112 Wn.App. 277, 284, 48 P.3d 372 (2002); *City of Wenatchee v. Owens*, 145 Wn.App. 196, 185 P.3d 1218 (2008). Therefore, Mr. Flores' signature on the application and final plat is necessary under the Cowlitz County ordinance.

Nonetheless, the trial court required Cowlitz County to disregard its own ordinances by not requiring Mr. Flores signature on the short subdivision application or the final plat. Its doing so was impermissible and in violation of well-established notions of separation of powers

between the executive, legislative, and judicial branches of government. Once the legislature has enacted a law or regulation, the judiciary must ascertain what the law is and then give that law effect. *Graffell v. Honeysuckle*, 30 Wn.2d 390, 401, 191 P.2d 858 (1948); *Matter of Salary of Juvenile Director*, 87 Wn.2d 232, 241, 552 P.2d 163 (1976).

Stated another way, the trial court believed that it had the authority to direct an act at odds with the clear language of a county ordinance. By doing so, it adopted an incorrect legal standard and an erroneous view of the law. Its decision was therefore based on an untenable reason and thus amounted to an abuse of discretion.

IV. The Doctrine of Unclean Hands Requires the Denial of Any Relief for the Benefits of the Hoggatts.

Injunctive relief is equitable in nature. Equity will not interfere on behalf of a party whose conduct in connection with the subject matter or transaction in litigation has been unconscientious, unjust, or marked by the want of good faith and will not afford that person any remedy. *Income Investors, Inc. v. Shelton*, 3 Wn.2d 599, 101 P.2d 973 (1940); *Portion Pak v. Bond*, 44 Wn.2d 161, 265 P.2d 1045 (1954).

The Hoggatts sold land to Mr. Flores without subdividing the property. This violated CCC 18.34.170(A). That regulation provides as follows:

No person shall sell, lease or transfer any real property which is less than five acres in area without full compliance with this title. . .

Their actions were also in violation of RCW 58.17.300. That statute states in pertinent part:

Any person. . .who violates any provision of this chapter or any local regulations adopted pursuant thereto relating to the sale, offer for sale, lease, or transfer of any lot, tract, or parcel of land, shall be guilty of gross misdemeanor. . .

The Hoggatts violation of the Cowlitz County subdivision ordinance serves to deny them injunctive relief pursuant to the doctrine of unclean hands. On that basis as well, the trial court should have denied them the equitable relief they sought.

STATEMENT REQUIRED BY RAP 18.1

In this appeal, Mr. Flores is seeking to dissolve an order that wrongfully allowed injunctive relief prior to trial on the merits. He is entitled to an award of attorney's fees on appeal if he is successful. *Alderwood Associates v. Washington Environmental Council*, 96 Wn.2d 230, 247, 635 P.2d 108 (1981); *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 143, 937 P.2d 154 (1997). On that basis, Mr. Flores seeks an award of attorney's fees on appeal.

CONCLUSION

The trial court committed error by granting what amounted to injunctive relief in the Order on Plaintiffs' Motion for Summary Judgment. To the contrary, it should have granted summary judgment to Mr. Flores and dismissed plaintiffs' claim. The Court of Appeals should reverse and remand with directions to vacate that order and dismiss the claims made by Mr. and Mrs. Hoggatt in the suit they filed. It should also direct an award of attorney's fees in favor of Mr. Flores.

RESPECTFULLY SUBMITTED this 29 day of ap,

2008.



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Of Attorneys for Luis Flores

