

Court of Appeals No. 48653-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CORY JESPERSEN and MELISSA JESPERSEN,

appellants,

v.

CLARK COUNTY, a political subdivision of the State of Washington,
and DOUGLAS LASHER, Clark County Treasurer,

respondents.

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Table of Authorities iii

I. Introduction 1

II. Assignments of Error

Assignments of Error 1

Issues Pertaining to Assignments of Error 2

III. Statement of the Case 2

IV. Summary of Argument 4

V. Argument 6

Standard of Review 6

Issue 1: Whether *Subdivision Act* remedies apply to the sale of illegal lots in tax foreclosures where the foreclosing county determined illegal status in a formal proceeding, but failed to make that information available to prospective purchasers? 6

Issue 2: Whether tax foreclosure sale without disclosure of illegal status is unduly oppressive upon purchasers, in deprivation of substantive due process? 18

Issue 3: Whether tax foreclosure sale without disclosure of illegal status deprives procedural due process because Chapter 84.64 RCW provides no mechanism to challenge the foreclosure and sale of illegal lots? 29

Issue 4: Whether tax foreclosure sale without disclosure of illegal status violates the *Civil Rights Act*? 30

Summary Judgment	33
Attorney Fees	34
VI. Conclusion	35

Appendices

Washington Statutes

RCW 58.17.040	A-1
RCW 58.17.210	A-3
RCW 84.64.040	A-4
RCW 84.64.050	A-5
RCW 84.64.080	A-7

Federal Statutes

42 U.S.C. §1983	A-10
42 U.S.C. §1988	A-11

Clark County Code

CCC 40.520.010	A-13
CCC 40.540.020	A-19

TABLE OF AUTHORITIES

Washington Cases

<i>Ackerman v. Port of Seattle</i> , 55 Wash.2d 400, 348 P.2d 664 (1960)	19
<i>Amunrud v. Board of Appeals</i> , 158 Wash.2d 208, 143 P.3d 571 (2006)	22
<i>Anderson v. King County</i> , 200 Wash. 354, 93 P.2d 284 (1939)	14
<i>Atherton Condominium Apartment-Owners Association v. Blume Development</i> , 115 Wash.2d 506, 799 P.2d 250 (1990)	33
<i>Barber v. Rochester</i> , 52 Wash.2d 691, 328 P.2d 711 (1958)	15-16
<i>Benn v. Grays Harbor County</i> , 102 Wash. 620, 173 P. 632 (1918)	11
<i>Busch v. Nervik</i> , 38 Wash.App. 541, 687 P.2d 872 (1984)	7, 15
<i>Capital Savings & Loan Ass'n v. Convey</i> , 175 Wash. 224, 27 P.2d 136 (1933)	16
<i>Christianson v. Snohomish Health Dist</i> , 133 Wash.2d 647, 946 P.2d 768 (1997)	27-28
<i>Cosmopolis Consolidated School District No. 99 v. Bruno</i> , 59 Wash.2d 366, 367 P.2d 995 (1962)	32
<i>Coulter v. Asten Group</i> , 155 Wash.App. 1, 12, 230 P.3d 169 (2010)	32

<i>Didlake v. Washington</i> , 186 Wash. App. 417, 345 P.3d 43 (2015)	29
<i>Cradduck v. Yakima County</i> , 166 Wash.App. 435, 271 P.3d 289 (2012)	22, 28, 29
<i>Fire Dist. No. 21 v. Whatcom County</i> , 171 Wash.2d 421, 433, 256 P.3d 295 (2011)	9, 10
<i>Folsom v. Burger King</i> , 135 Wash.2d 658, 958 P.2d 301 (1998)	6
<i>Guimont v. Clarke</i> , 121 Wash.2d 586, 854 P.2d 1 (1993)	19, 27, 29
<i>Heavens v. King County</i> , 66 Wash.2d 558, 404 P.2d 453 (1965)	26
<i>HornBack v. Wentworth</i> , 132 Wash.App. 504, 132 P.3d 778 (2006)	15
<i>Knatvold v. Rydman</i> , 28 Wash.2d 178, 182 P.2d 9 (1947)	16
<i>Ko v. Royal Globe Insurance</i> , 20 Wash.App. 735, 583 P.2d 635 (1978)	10
<i>Malted Mousse v. Steinmetz</i> , 150 Wash.2d 518, 79 P.3d 1154 (2003)	35
<i>Mission Springs v. Spokane</i> , 134 Wash.2d 947, 954 P.2d 250 (1998)	18, 31
<i>Newport Yacht Basin v. Supreme Northwest</i> , 168 Wash.App. 56, 277 P.3d 18 (2012)	12, 13, 16, 33
<i>Orion v. State</i> , 109 Wash.2d 621, 747 P.2d 1062 (1987)	19

Presbytery of Seattle v. King County,
114 Wash.2d 320, 787 P.2d 907 (1990) 19, 20, 22, 36

Rathke v. Yakima Valley Grape Growers,
30 Wash. 2d 486, 192 P.2d 349, 362 (1948) 16

Record Publishing v. Monson,
123 Wash. 569, 213 P. 13 (1923) 9

Rivett v. Tacoma,
123 Wash.2d 573, 870 P.2d 299 (1994) 27

Robinson v. Seattle,
119 Wash.2d 34, 830 P.2d 318 (1992) 20, 26

Roon v. King County,
24 Wash.2d 519, 166 P.2d 165 (1946) 15

Samis Land v. Soap Lake,
143 Wash.2d 798, 23 P.3d 477 (2001) 33

Seattle Taxi v. King County,
49 Wash. App. 617, 744 P.2d 1082 (1987) 17

Shelton v. Klickitat County,
152 Wash. 193, 277 P. 839 (1929) 13, 14

Shook v. Scott,
56 Wash.2d 351, 353 P.2d 431 (1960) 15, 16

Sienkiewicz v. Smith,
97 Wash.2d 711, 649 P.2d 112 (1982) 7

Sintra v. Seattle,
119 Wash.2d 1, 829 P.2d 765 (1992) 19-20, 26, 29, 31

Weden v. San Juan County,
135 Wash.2d 678, 958 P.2d 273 (1998) 19, 23, 28

William G. Hulbert, Jr. and Clare Mumford Hulbert Revocable Living Trust v. Port of Everett, 159 Wash.App. 389, 245 P.3d 779 (2011) . 20, 33

Out of State Cases

Simonette v. Great American Insurance,
165 Conn. 466, 338 A.2d 453 (1973) 10

Federal Cases

Mathews v. Eldridge,
424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) 30

Nollan v. California Coastal Commission,
483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) 18-19

Sacramento v. Lewis,
523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) 22

Seattle Title Trust Company v. Roberge,
278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 (1928) 18, 31

Washington Statutes

Chapter 7.43 RCW 28

RCW 34.05.010 32

Chapter 58.17 RCW 6, 8, 21, 32

RCW 58.17.040 11

RCW 58.17.210 1, 7, 9, 12, 13, 15, 16, 17, 30, 32, 35

Chapter 59.21 RCW 26

Chapter 84.64 RCW	2, 21, 25, 29, 30, 32, 37
RCW 84.64.040	10
RCW 84.64.050	4, 23
RCW 84.64.080	10, 12

Washington Constitution

WA Const., article 1, section 3	19
---------------------------------------	----

Federal Statutes

42 U.S.C. §1983	1, 31, 35
42 U.S.C. §1988	35

Federal Constitution

U.S. Const., 5 th amendment	19
U.S. Const., 14 th amendment	19

Clark County Code

CCC 18.100.600(A)	3
CCC 40.210.020(A)	23, 25
CCC 40.520.010(A)(2)	8
CCC 40.520.010(F)(4)	3, 18
CCC 40.520.010(H)(3)	17

CCC 40.530.010(A)	21
CCC 40.530.010(C)(1)(b)	9, 16, 24
CCC 40.540.020(B)(1)	8
CCC 40.540.020(B)(2)	8
CCC 40.540.020(B)(4)	8
CCC 40.540.020(B)(4)(h)	8

I. INTRODUCTION

This appeal presents the issue of whether *Subdivision Act* remedies apply to the sale of illegal lots in tax foreclosures, where the foreclosing county determined illegal lot status in a formal proceeding, but failed to make that information available to prospective purchasers. In the alternative, this appeal presents issues of whether such activity is unduly burdensome, in deprivation of the purchasers' rights to substantive due process, and in violation of the *Civil Rights Act*. 42 U.S.C. §1983, *et seq.*

* * *

II. ASSIGNMENTS OF ERROR

Assignment of Error:

Appellants, Cory and Melissa Jespersen, assign error to the following:

1. Trial court's denial of *Plaintiffs' Motion for Summary Judgment*, and grant of Clark County's cross-motion to dismiss claims seeking damages or rescission under RCW 58.17.210. *CP 256-58.*

2. Trial court's denial of *Plaintiffs' Second Motion for Summary Judgment*, and grant of Clark County's cross-motion to dismiss constitutional claims. *CP 386-87.*

* * *

Issues Pertaining to Assignments of Error

ISSUE 1: Whether *Subdivision Act* remedies apply to the sale of illegal lots in tax foreclosures where the foreclosing county determined illegal status in a formal proceeding, but failed to make that information available to prospective purchasers? (Assignment of Error 1.)

ISSUE 2: Whether tax foreclosure sale without disclosure of illegal status is unduly oppressive upon purchasers, in deprivation of substantive due process? (Assignment of Error 2.)

ISSUE 3: Whether tax foreclosure sale without disclosure of illegal status deprives procedural due process because Chapter 84.64 RCW provides no mechanism to challenge the foreclosure and sale of illegal lots? (Assignment of Error 2.)

ISSUE 4: Whether tax foreclosure sale without disclosure of illegal status violates the *Civil Rights Act*? (Assignment of Error 2.)

* * *

III. STATEMENT OF THE CASE

On July 24, 1998, Clark County published a *Development Review Decision – LOT 98-033*, concluding that “Tax Lots 26 and 27 are ONE LEGAL LOT.” *CP 36, 43*. The decision explained its conclusion as follows:

The subject parcels (Lot 26 and 27) were created on May 9, 1978 in violation of the County Short Plat Ordinance. Both lots did comply with the then zoning of FX which had a 1-acre minimum lot size requirement. However, the lots do not comply with today's zoning minimum of 10-acres in the R-10 zone.

CP 58. Lot 27 comprises 2.89 acres, and cannot comply with the ten-acre zoning minimum. *CP 44.*

On June 14, 1999, Clark County published a *Development Review Decision – PDR 98-030*, approving “the request to recognize the subject property [Tax Lot 27] in the Public Interest as a separate legal lot of record, subject [*inter alia*] to the following conditions of approval:”

1. Have a wetland delineation performed for tax lot 27, which clearly shows area for a home site . . .
2. Should a suitable home site not be found on tax lot 27 a boundary line adjustment may be performed to move tax lot 27 outside of the wetlands area. . . .

CP 36, 50. Said conditions of approval were neither satisfied nor appealed prior to applicable deadlines provided in the Clark County Code, CCC 40.520.010(F)(4), *CP 36, 76*; CCC 18.100.600(A). On May 24, 2002, Tax Lot 26 was divided from Tax Lot 27 by conveyance to Anthony P. Sha under a *Statutory Warranty Deed* filed at Clark County Auditor's File No. 3471152. *CP 36, 53.*

Plaintiffs acquired Tax Lot 27 under a *Treasurer's Tax Deed* dated February 6, 2014 (Clark County Auditor's File No. 5052665, re-recorded at 5055795). *CP 36, 39*. Said deed was signed by defendant Douglas Lasher in his capacity as "Grantor . . . Clark County Treasurer." *CP 40*. In foreclosing the subject property, Treasurer Lasher followed statutory authority to issue certificates and prosecute foreclosures after three years delinquency in the payment of property taxes and assessments. RCW 84.64.050

Investigating the illegal lot status which they discovered after the auction, plaintiffs were mistakenly informed by Clark County staff-person Vicki Kershner that the subject property *is* a legal lot of record:

As promised, please find attached the decision rendered in 1998 which recognized the 2.89 acre parcel (#27) you purchased as a legal lot of record.

CP 331. As noted above, the 1998-decision concluded that Lots 26 and 27 *together* comprise one legal lot; hence, Lot 27 could not constitute a legal lot after Lot 26 had been sold separately. *Supra*, 1-2.

* * *

IV. SUMMARY OF ARGUMENT

The *Tax Foreclosure Statute*, adopted in 1881, requires counties to

foreclose tax-deficient properties after three years delinquency. The *Subdivision Act*, enacted in 1969, provides remedies to purchasers of land transferred in violation of the *Act*. There is no conflict, and supersession does not apply, because the statutes do not regulate the same subject matter to extent that they cannot be harmonized. The legislature is presumed to have enacted the *Subdivision Act* with knowledge of the *Tax Foreclosure Statute*, and the later in time is accorded preference.

In the alternative, foreclosure-sale without disclosure of illegal status is unduly burdensome and deprives purchasers of substantive due process. The County's practice shifts the cost of a public policy to private land owners, and fails to target any behavior or condition contributing to a public problem. Plaintiffs' purchase did not contribute to the problems of illegal lots nor tax deficiency because the property was both illegal and tax deficient prior to auction. The property has been foreclosed every four years (2006, 2010 and 2014), so the County's practice does not *solve* any public problem. Moreover, the plaintiffs have proposed a solution that is far less oppressive: maintenance of a public register of illegal lot determinations.

Plaintiffs are entitled to damages, costs and attorney fees under the *Subdivision Act* and federal *Civil Rights Act*, as well as RAP 18.1.

V. ARGUMENT

Standard of review

Appellate review of summary judgment is *de novo*. *Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998).

* * *

ISSUE 1: Whether *Subdivision Act* remedies apply to the sale of illegal lots in tax foreclosures where the foreclosing county determined illegal status in a formal proceeding, but failed to make that information available to prospective purchasers?

Subdivision Act:

Chapter 58.17 RCW provides remedies of damages, rescission and, in either case, attorney fees and costs, to “all purchasers or transferees” who acquire property “divided in violation of this chapter or local regulations adopted pursuant thereto:”

No building permit, septic tank permit, or other development permit, shall be issued for any lot, tract, or parcel of land divided in violation of this chapter or local regulations adopted pursuant thereto unless the authority authorized to issue such permit finds that the public interest will not be adversely affected thereby. The prohibition contained in this section shall not apply to an innocent purchaser for value without actual notice. **All purchasers’ or transferees’ property shall comply with provisions of this chapter** and each purchaser or transferee may recover his or her damages

from any person, firm, corporation, or agent selling or transferring land in violation of this chapter or local regulations adopted pursuant thereto, including any amount reasonably spent as a result of inability to obtain any development permit and spent to conform to the requirements of this chapter as well as cost of investigation, suit, and reasonable attorneys' fees occasioned thereby. Such purchaser or transferee may as an alternative to conforming his or her property to these requirements, rescind the sale or transfer and recover costs of investigation, suit, and reasonable attorneys' fees occasioned thereby.

RCW 58.17.210 (2010 c 8 §18005; 1974 ex.s. c 134 §10; 1969 ex.s. c 271 §21), emphasis added. The Supreme Court holds that rights of damages and rescission are available to *all purchasers or transferees* whose property fails to “comply with the provisions of the effective platting and subdivision statutes.” *Sienkiewicz v. Smith*, 97 Wash.2d 711, 715, 649 P.2d 112 (1982), emphasis added. The Court of Appeals holds “[t]he right granted is purely statutory; neither fraud nor breach of warranty need be alleged or proved.” *Busch v. Nervik*, 38 Wash.App. 541, 547, 687 P.2d 872 (1984).

Clark County ordinances require the approval and recording of a final plat prior to sale of divided lots:

Agreements to transfer land prior to final plat or short plat is authorized; provided, that the performance of an offer or agreement to sell, lease or otherwise transfer a lot, tract or parcel of land following preliminary plat or short plat approval is expressly conditioned on the recording of the final plat or short plat containing the lot, tract or parcel.

CCC 40.540.020(B)(2), *CP 36, 85*. County ordinances further provide that “all divisions of land, except those listed in Section 40.540.020(B)(4), shall be subject to the provisions of the applicable portions of Chapter 58.17 RCW and this chapter.” CCC 40.540.020(B)(1). Tax foreclosures are not exempted under CCC 40.540.020(B)(4). “Divisions of land made by court order” are exempt, “provided, the divisions shall comply with all other provisions of the UDC [Title 40 CCC].” CCC 40.540.020(B)(4)(h). “Other provisions” of the *Uniform Development Code* (“UDC”) include the following:

In summary, parcels are lots of record if they were in compliance with applicable laws regarding zoning and platting at the time of their creation. Zoning laws pertain primarily to the minimum lot size and dimensions of the property. Platting laws pertain primarily to the review process used in the creation of the lots.

CCC 40.520.010(A)(2), *CP 36, 73*.

Any lot, use, or structure which, in whole or part, is not in conformance with current zoning requirements shall be considered as follows: . . .

b. *Illegal Nonconforming*. Lots, uses and structures which were not in conformance with applicable zoning and/or platting regulations at the time of creation or establishment. Illegal nonconforming lots, uses and structures shall be discontinued, terminated or brought into compliance with current standards.

CCC 40.530.010(C)(1)(b), *CP 36, 78.*

Tax Lots 26 and 27 were divided by conveyance of Tax Lot 26 to Anthony P. Sha (separate from Tax Lot 27) on May 24, 2002, *after* Clark County had determined that said tax lots comprised a single legal lot of record on July 24, 1998. *CP 53 and 43.* The conveyance violated RCW 58.17.210 and CCC 40.540.020(B). Moreover, the *Treasurer's Tax Deed* from Clark County to the plaintiffs also violated the cited provisions because it constituted a "transfer [of] land prior to final plat or short plat" which was not "conditioned on the recording of the final plat or short plat containing the lot, tract or parcel." CCC 40.540.020(B)(2), *CP 36-37, 85.* Hence, the plaintiffs have rights to damages, rescission, attorney fees, and costs under RCW 58.17.210.

RCW 58.17.210 fails to exempt governments from liability. "[T]he government, including the state, when legislating upon such matters, can generally except itself and its legal subdivisions from the provisions of statutes intended to govern the public generally." *Record Publishing v. Monson*, 123 Wash. 569, 576, 213 P. 13, 16, *modified*, 123 Wash. 569, 215 P. 71 (1923). "Where the plain language of a statute is unambiguous and legislative intent is apparent, we will not construe the statute otherwise."

Fire Dist. No. 21 v. Whatcom County, 171 Wash.2d 421, 433, 256 P.3d 295 (2011).

If and when the legislature chooses to exempt political subdivisions from liability under the *Subdivision Act*, courts should enforce that exception; until then, courts should “refrain from rewriting, under the pretext of interpretation, the clearly expressed language of a legislative enactment.” *Ko v. Royal Globe Insurance*, 20 Wash.App. 735, 740 fn. 2, 583 P.2d 635 (1978); quoting *Simonette v. Great American Insurance*, 165 Conn. 466, 338 A.2d 453, 454-56 (1973).

Statutory conflicts:

The *Treasurer’s Tax Deed* under which plaintiffs acquired title to Tax Lot 27 (AFN 5052665, re-recorded at AFN 5055795) was executed pursuant to RCW 84.64.080. *CP 36, 55, 85*. The statute requires the prosecuting attorney to “prosecute to final judgment all actions brought by holders of certificates under the provisions of this chapter for foreclosure of tax liens.” RCW 84.64.040.

Supersession applies to statutory conflicts only when two statutes pertain to the same subject matter, to the extent they cannot be harmonized:

A more specific statute supersedes a general statute only if the two statutes pertain to the same subject matter and conflict to

the extent they cannot be harmonized. The maxim of express mention and implicit exclusion should not be used to defeat legislative intent.

In re Estate of Kerr, 134 Wash. 2d 328, 343, 949 P.2d 810 (1998). In the present case, the *Subdivision Act* prohibits the sale of illegal lots, and the *Tax Foreclosure Statute* mandates foreclosure of delinquent tax lots. These statutes do not pertain to the same subject matter; hence, the later-passed statute is accorded preference:

It is apparent that both these statutes are general in their nature, and, if there is a conflict between them the one passed later in time should be given preference, for the Legislature must be presumed to have passed it with knowledge of existing statutes.

Benn v. Grays Harbor County, 102 Wash. 620, 622-23, 173 P. 632 (1918). The *Tax Foreclosure Statute* was enacted in 1881 (§2917). The *Subdivision Act* was adopted in 1969 (ex.s. c 271 §21), and the legislature is presumed to have passed it with knowledge of prior statutes. The *Subdivision Act* does not exempt tax foreclosures, notwithstanding an exemption section that has been amended on multiple occasions. RCW 58.17.040 (2004 c 239 §1; 2002 c 44 §1; 1992 c 220 §27; 1989 c 43 §4-123; 1987 c 354 §1; 1987 c 108 §1; 1983 c 121 §2; 1981 c 293 §3; 1981 c 292 §2; 1974 ex.s. c 134 §2; 1969 ex.s. c 271 §4). In addition, the *Tax Foreclosure Statute* was amended after 1969

without mention of subdivision provisions. RCW 84.64.080 (2004 c 79 §7; 2003 c 23 §5; 1999 c 153 §72; 1999 c 18 §8; 1991 c 245 §27; 1981 c 322 §5).

Hence, the rule presumes that the legislature saw no conflict.

Moreover, the Court of Appeals holds that RCW 58.17.210 does not *prohibit* the sale of illegal lots:

While [RCW 58.17.210] provides that certain permits may not be issued on illegally subdivided property, this section exempts an innocent purchaser from these consequences, indicating that, at minimum, such purchases are permissible. Furthermore, this section stipulates that any purchaser – innocent or not – may recover damages incurred as a result of buying land that has been subdivided in violation of either state or local regulations. . . . Alternatively, the purchaser may choose to “rescind the sale or transfer and recover costs . . . occasioned thereby.” . . . A statutory scheme that leaves the choice of remedies to the discretion of the purchaser clearly contemplates that illegally subdivided land may be bought and sold.

Newport Yacht Basin v. Supreme Northwest, 168 Wash.App. 56, 73-74, 277 P.3d 18, *review denied*, 175 Wash.2d 1015 (2012). The *Subdivision Act* and *Tax Foreclosure Statute* are harmonized by the Court’s interpretation that the former does not prohibit the sale of illegal lots; rather, it provides avenues for regulatory compliance, at the election of the purchaser/grantee. Hence, the treasurer is required to foreclose tax-deficient properties, and the purchaser/grantee may elect to pursue rescission of the sale of any lot divided

in violation of the *Subdivision Act* or regulations adopted thereunder.

Caveat Emptor

A 1974 amendment of RCW 58.17.210, *Substitute House Bill 383*, removed a distinction between *innocent* and *other* purchasers or transferees.¹ *CP 188, 196*, ln. 18-19. This lack of distinction was clarified by the Court of Appeals in 2012 as follows:

[T]his section stipulates that **any purchaser – innocent or not** – may recover damages incurred as a result of buying land that has been subdivided in violation of either state or local regulations. RCW 58.17.210. Alternatively, the purchaser may choose to “rescind the sale or transfer and recover costs . . . occasioned thereby.”

Newport Yacht Basin Assn., 168 Wash.App. at 73. The holding in *Newport Yacht Basin* refutes any notion that purchasers must be innocent of defects in order to invoke statutory remedies of rescission, damages and attorney fees under RCW 58.17.210.

The Washington Supreme Court, in *Shelton v. Klickitat County* held that *caveat emptor* precluded recovery *because* there was no statute authorizing rescission in 1929. In the words of the Court:

If this sale and conveyance by the county to Shelton was in legal effect a tax sale, then it seems clear that the rule of

¹Although Substitute House Bill 383 also deleted the exemption covering innocent purchasers for value without actual notice, that exemption was reinstated on final vote.

caveat emptor stands insurmountably in the way of Shelton recovering from the county the purchase price; **there being in this state no statute** requiring any warranty in the deed of conveyance or **providing for repayment of the purchase price because of any defect** in the proceeding leading up to the sale, or failure of title passing to the grantee by the deed. The rule is tersely stated in the text of 26 R. C. L. 435, as follows: 'It is held by the weight of authority that one who has purchased land at a tax sale cannot, **without statutory authority**, recover back the price paid from the municipality by which the money was received if it subsequently appears that the title acquired by him was invalid.'

Shelton v. Klickitat County, 152 Wash. 193, 197, 277 P. 839 (1929),

emphasis added. The rule was restated by the Court in 1939:

Our holding in *Shelton v. Klickitat County*, 152 Wash. 193, 277 P. 839, that the purchaser at resale from the county, who acquired no title as a result of the sale being void, could not recover the purchase price from the county is in accord with the general rule that, **unless aided by express statutory authority**, the holder of an invalid tax title is not entitled to recover back his money against the county or state from whom the purchase was made.

Anderson v. King County, 200 Wash. 354, 361, 93 P.2d 284 (1939), emphasis added. While there was no statutory authority for rescission in 1929 or 1939, the *Subdivision Act*, including its remedy provision, was adopted in 1969 (1969 ex.s. c 271 §21); hence, rescission is explicitly authorized by the above-quoted decisions.

Even if the general common law rule of *caveat emptor* applies to tax

sales, the specific rule of rescission under RCW 58.17.210 applies where the property sold is *not* a legal lot of record. “[T]he power of the court to formulate the common law is recognized only up to the time the legislature acts within its constitutional limitations upon the same subject matter.” *Roon v. King County*, 24 Wash.2d 519, 531-32, 166 P.2d 165 (1946).

Failure of consideration:

Decisions under the *Subdivision Act* construed statutory remedies as cumulative with common law remedies:

No party contends that the statutory measures of recovery provided in RCW 58.17.210 constitute the total measure of the remedies available upon rescission. Indeed, the wording of the statute lends itself to the interpretation that the statutory measures simply *augment* the usual panoply of measures which flow from a purchaser’s common law right of rescission. We so hold.

Busch, 38 Wash.App. at 547. Accord, *HornBack v. Wentworth*, 132 Wash.App. 504, 511, 132 P.3d 778 (2006).

Washington Courts have long held that substantial failure of consideration justifies rescission:

Partial failure of consideration, if substantial, justifies rescission, but must go to the root of the contract or be such as to defeat the aims and intentions of the parties.

Shook v. Scott, 56 Wash.2d 351, 367, 353 P.2d 431 (1960); citing *Barber v.*

Rochester, 52 Wash.2d 691, 328 P.2d 711 (1958); *Knatvold v. Rydman*, 28 Wash.2d 178, 182 P.2d 9 (1947); *Capital Savings & Loan Ass'n v. Convey*, 175 Wash. 224, 27 P.2d 136 (1933). In *Shook*, the inadequacy of a water supply constituted failure of consideration, going to the “very root” and justifying rescission of a contract for sale of agricultural land. *Shook*, 56, Wash.2d at 467. In *Rathke v. Yakima Valley Grape Growers*, an illegal sales agreement which could not be enforced constituted failure of consideration justifying rescission. *Rathke v. Yakima Valley Grape Growers*, 30 Wash. 2d 486, 509, 192 P.2d 349, 362 (1948).

In the present case, illegal lot status goes to the root of the *Trustee's Tax Deed* because “illegal nonconforming lots, uses and structures shall be discontinued, terminated or brought into compliance with current standards.” CCC 40.530.010(C)(1)(b). However, plaintiffs have no burden of pursuing “compliance with current standards” because RCW 58.17.210 “leaves the choice of remedies to the discretion of the purchaser.” *Newport Yacht Basin*, 168 Wash.App. at 73-74. If CCC 40.530.010(C)(1)(b) forbids plaintiffs’ choice, it is pre-empted by RCW 58.17.210. “[A]n ordinance is unconstitutional if it “attempts to authorize what the Legislature has forbidden or . . . forbid[s] what the Legislature has expressly licensed,

authorized, or required.”” *Seattle Taxi v. King County*, 49 Wash. App. 617, 622, 744 P.2d 1082 (1987).

On the other hand, private action for rescission is a “potential remedial measure” specified in the County Code:

H. Potential Remedial Measures: . . .

3. Private action to rescind the sale or transfer, and recover cost of investigation and suit from the selling party if the property was transferred in violation of applicable zoning and platting regulations, as authorized by RCW 58.17.210.

CCC 40.520.010, *CP 36, 76*. There is no limitation of potential defendants in private actions under the foregoing provision.

Illegal lot status goes to the root of the *Treasurer’s Tax Deed* because it defeats plaintiffs’ ability to construct a residence upon the Tax Lot 27. The failure of plaintiffs’ predecessors to satisfy conditions of approval under *Development Review Decision – PDR 98-030* dated June 14, 1999, *supra*, evidences the futility of attempting to satisfy current standards within the boundaries of Tax Lot 27; and division by sale of Tax Lot 26 in 2002 prevents a boundary adjustment contemplated by Condition 2:

Should a suitable home site not be found on Tax Lot 27 a boundary line adjustment may be performed to move Tax Lot 27 outside of the wetlands area.

CP 36, 50. Plaintiffs own no land which could be boundary adjusted into Tax Lot 27, and neither legal lot determinations nor boundary adjustments invoke a private right of condemnation. Moreover, said conditional approval expired when not satisfied by June 14, 2004:

Recognition of lot of record status based on the public interest exception shall be valid for five (5) years from the date of lot determination or review in which the determination was made. If a building or other development permit is not sought within that time, the determination will expire. Applications for development or lot recognition submitted after five (5) years shall require compliance with applicable standards at that time.

CCC 40.520.010(F)(4), *CP 36, 76.*

* * *

ISSUE 2: Whether tax foreclosure sale without disclosure of illegal status is unduly oppressive upon purchasers, in deprivation of substantive due process?

Protected Property Interest

Plaintiffs have a protected property interest for purpose of substantive due process because “[t]he right to use and enjoy land is a property right.” *Mission Springs v. Spokane*, 134 Wash.2d 947, 962-63, 954 P.2d 250 (1998); citing *Seattle Title Trust Company v. Roberge*, 278 U.S. 116, 121, 49 S.Ct. 50, 52, 73 L.Ed. 210 (1928); *Nollan v. California Coastal Commission*, 483

U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); and *Ackerman v. Port of Seattle*, 55 Wash.2d 400, 409, 348 P.2d 664 (1960) (“Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal.”) In the present case illegal lots which cannot be “brought into compliance with current standards” must be discontinued or terminated; thus frustrating any right of use and enjoyment. CCC 40.530.010(C)(1)(b).

Undue burden

Due process is protected by the 5th and 14th amendments to the U.S. Constitution, and article 1, section 3 of the Washington Constitution. The final prong of substantive due process analysis, “whether the enactment is ‘unduly oppressive’ . . . lodges wide discretion in the court and implies a balancing of the public’s interest against those of the [person regulated]:”

The purpose of this analysis is to prevent excessive police power regulations that would require an individual “to shoulder an economic burden, which in justice and fairness the public should rightfully bear.”

Weden v. San Juan County, 135 Wash.2d 678, 706, 958 P.2d 273 (1998); citing *Presbytery of Seattle v. King County*, 114 Wash.2d 320, 331, 787 P.2d 907 (1990); *Orion v. State*, 109 Wash.2d 621, 648-49, 747 P.2d 1062 (1987); *Guimont v. Clarke*, 121 Wash.2d 586, 610-11, 854 P.2d 1 (1993); *Sintra v.*

Seattle, 119 Wash.2d 1, 22, 829 P.2d 765 (1992); and *Robinson v. City of Seattle*, 119 Wash.2d 34, 55, 830 P.2d 318 (1992). In *Presbytery*, the Court articulated factors to inform the balancing of public and private interests:

We have suggested several factors for the court to consider to assist it in determining whether a regulation is overly oppressive, namely: the nature of the harm sought to be avoided; the availability and effectiveness of less drastic protective measures; and the economic loss suffered by the property owner.

Presbytery v. King County, 114 Wash.2d 320, 330-31, 787 P.2d 907 (1990).

The decision elaborated on the foregoing, endorsing factors posited by Professor William B. Stoebuck of the University of Washington Law School:

On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.

Presbytery, 114 Wash. 2d at 331; citing Stoebuck, *San Diego Gas: Problems, Pitfalls and a Better Way*, 25 Journal of Urban and Contemporary Law 3, 33 (1983). In the present case:

Public side

Seriousness of the public problem: The nonpayment of property taxes is a problem addressed by the *Tax Foreclosure Statute*, Chapter 84.64 RCW. The chapter includes no statement of purpose; however, the fact that foreclosures occur indicates that it addresses the problem. The County *Nonconforming Lot Ordinance*, Chapter 40.530.010, adopted under state *Subdivision Act*, Chapter 58.17 RCW, identifies its purpose as allowing continuation and modification of legal nonconforming uses and structures “consistent with the objectives of maintaining the economic viability of such uses and structures while protecting the rights of surrounding property owners to use and enjoy their properties.” CCC 40.530.010(A).

The present case does not argue *facial* invalidity of statute nor ordinance based upon deprivation of substantive due process. Rather, the County’s *enforcement* without disclosure of illegal lot status is the act and/or failure to act which deprived the plaintiffs of substantive due process. Such action does not serve the purpose of collecting delinquent taxes nor regulating nonconforming lots because said purposes would be served equally well if the County provided disclosure. The validity of the statutes cannot shelter the County from liability for unduly burdensome enforcement.

In 2012, the Court of Appeals observed that liability for constitutional deprivation turns upon government action, regardless of statute validity:

The touchstone of due process is protection of the individual against arbitrary government actions, whether in denying fundamental procedural fairness (procedural due process) or in exercising power arbitrarily, without any reasonable justification in the service of a legitimate government interest (substantive due process). . . . “Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” . . . In other words, a government action denies a person their substantive due process right if the police power has exceeded its constitutional limits.

Craddock v. Yakima County, 166 Wash.App. 435, 442-43, 271 P.3d 289 (2012); citing *Sacramento v. Lewis*, 523 U.S. 833, 845-46, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998); *Amunrud v. Board of Appeals*, 158 Wash.2d 208, 218-19, 143 P.3d 571 (2006); and *Presbytery*, 114 Wash.2d 320.

Extent to which the owner’s land contributes to the public

problem: Plaintiffs’ purchase at auction did not contribute the problems of illegal lots nor tax deficiency because their lot was illegal and tax deficient long before the auction.

Degree to which the proposed regulation solves a public problem:

The County’s foreclosure-sale of illegal lots without disclosure *contributes* to tax deficiency as evidenced by repeated tax foreclosures of plaintiffs’

property in 2006, 2010 and 2014. *CP 282*, ln. 5-21. We may infer from the rate of foreclosure (every four years) that the purchasers stop paying taxes shortly after purchase because tax foreclosures are conducted “after the expiration of three years from the date of delinquency.” RCW 84.64.050(1). Hence, the County’s action does not *solve* a public problem.

Feasibility of less oppressive solutions: Plaintiffs have proposed a solution which is imminently feasible because Clark County possesses all of the data necessary to create a public index of illegal lot determinations. Based upon their inability to provide accurate information upon request by the plaintiffs, County staff are equally in need of such a system. *CP 222-23*. If maintenance of an index is too burdensome, the County could simply record such determinations in title records.

Owner’s side

Amount and percentage of value loss: Plaintiffs’ loss is the amount of their purchase price, \$28,600, because their property is *not* usable for its zoned purpose (R-10): “to provide lands for residential living in the rural area.” CCC 40.210.020(A). As in *Weden*, value loss to the plaintiffs is total.

Extent of remaining uses, past, present and future uses: There are no remaining uses because illegal lots which cannot be “brought into

compliance with current standards” must be terminated. CCC 40.530.010(C)(1)(b); CP 78. While the word “terminated” is not defined in the County Code, the reason for illegal status is explained in County records:

The subject parcels (Lot 26 and 27) were created on May 9, 1978 in violation of the County Short Plat Ordinance. Both lots did comply with the then zoning of FX which had a 1-acre minimum lot size requirement. However, the lots do not comply with today’s zoning minimum of 10-acres in the R-10 zone.

CP 48. Because compliance is impossible for plaintiffs’ 2.89-acre lot, it must be terminated (through boundary adjustment into a neighboring lot), and will then cease to exist as a separate lot of record.

Temporary or permanent nature of the regulation: Reading “action” in place of “regulation,” the effect is permanent because lot has already been determined to be illegal, and must be terminated. *Supra*.

Extent to which the owner should have anticipated such regulation: The issue in the present case is whether the plaintiffs should anticipate local governments taking advantage of citizens through concurrent enforcement of the *Tax Foreclosure Statute* and *Nonconforming Lot Ordinance* without disclosing prior illegal lot determinations under the latter (contained only in County records that are unavailable for search by prospective bidders) which renders the property worthless for its zoned

purpose: “to provide lands for residential living in the rural area.” CCC 40.210.020(A). To argue that such behavior by elected and appointed officials should be anticipated is consistent only with an Orwellian world in which citizens must be ever vigilant of the thieving hand of government.

How feasible it is for the owner to alter present or currently planned uses: Plaintiffs’ property is vacant. Record owners have made no use of the property since it was divided from Tax Lot 26 by conveyance to Anthony P. Sha under *Statutory Warranty Deed* dated May 24, 2002, (AFN 3471152). *CP 53*. The County, on the other hand, has made a profitable use repeatedly foreclosing for delinquent taxes. *CP 282*, ln. 5-21. As to the future, no change is anticipated because purchasers at auction will stop paying taxes upon discovery of illegal status; hence, the County will be required to foreclose every four years under Chapter 84.64 RCW.

When the foregoing factors are balanced, it becomes evident that the County’s act of foreclosure-sale without disclosure of illegal lot status, previously determined by the County in 1998, deprived the plaintiffs of substantive due process.

Washington Courts have analyzed “undue oppression” based upon relative public and private benefits and burdens. In 1965 the Supreme Court

held that special assessments for local improvements deprive substantive due process where no benefit accrues to property taxed. *Heavens v. King County*, 66 Wash.2d 558, 564, 404 P.2d 453 (1965).

In 1992, the Court invalidated an ordinance requiring developers who demolish low income housing to pay for construction of replacement housing, holding that a \$219,000 fee to develop a \$670,000 property was unduly oppressive:

Sintra's property cannot be singled out as contributing to the problem of homelessness in any pronounced way; the lack of low income housing was brought about by a great number of economic and social causes which cannot be attributed to an individual parcel of property.

Sintra, 119 Wash.2d at 22. Accord *Robinson*, 119 Wash.2d at 55.

In 1993, the Court held that the *Mobile Home Relocation Act*, Chapter 59.21 RCW, "is unduly oppressive and violates substantive due process" by requiring mobile home parks to contribute relocation costs for displaced tenants:

[T]he costs of relocating mobile home owners, like the related and more general problems of maintaining an adequate supply of low income housing, are more properly the burden of society as a whole than of individual property owners. While the closing of a mobile home park is the immediate cause of the need for relocation assistance, it is the general unavailability of low income housing and the low income status of many of the mobile home owners that is the more

fundamental reason why the relocation assistance is necessary. An individual park owner who desires to close a park is not significantly more responsible for these general society-wide problems than is the rest of the population. Requiring society as a whole to shoulder the costs of relocation assistance represents a far less oppressive solution to the problem.

Guimont, 121 Wash.2d at 611.

In 1994, the Court invalidated an ordinance penalizing abutting landowners for failure to report defects in public sidewalks:

It is unreasonable and “unduly oppressive” to require an abutting private landowner to indemnify the City without limitation for any sum paid to a person injured on a public sidewalk in order to enforce an ordinance requirement that the abutting landowner maintain the public sidewalk free of defects.

Rivett v. Tacoma, 123 Wash.2d 573, 582, 870 P.2d 299 (1994). The Court noted that “the ordinance purports to require indemnification without the adjudication of fault against the abutting landowner.” *Rivett*, 123 Wash.2d at 583.

In 1997, cabin owners had “not been asked to ‘shoulder’ a burden of society” because a resolution prohibiting additions to buildings with substandard septic systems made each landowner responsible for the inadequacies of their own system: “This obligation is required of all individuals who decide to add onto their existing homes.” *Christianson v.*

Snohomish Health Dist, 133 Wash.2d 647, 666, 946 P.2d 768 (1997). By contrast in the present case, most citizens avoid entirely the societal cost of owning illegal lots.

In 1998 the Court upheld an ordinance prohibiting personal watercraft (PWC) on certain waters because “PWC owners are directly responsible for problems created by the use of their machines.” *Weden*, 135 Wash.2d at 707. In the present case, buyers at tax foreclosures are not responsible for tax deficiencies nor illegal lots.

In 2000, the Court of Appeals held that an abatement ordered under Chapter 7.43 RCW violated substantive due process in requiring one-year closure of a restaurant and lounge in order to prevent patrons from trafficking in illegal drugs. On the public side, the Court noted a lack of evidence that the facility contributed to illegal drug activity, or that closure would have any effect on such activity in the vicinity. *McCoy*, 101 Wash.App. at 841. On the private side, loss of value from abatement was total, albeit temporary. *McCoy*, 101 Wash. App. at 842.

The Court of Appeals has noted “[w]here the courts have held that a regulation was unduly oppressive, the regulation shifted the cost of a public policy to a private landowner.” *Cradduck*, 166 Wash.App. at 447; citing

Guimont, 121 Wash.2d at 611-13; and *Sintra*, 119 Wash.2d at 22. The decision also noted that “regulations were not unduly oppressive when [they] targeted a particular behavior or condition that contributed to a public problem.” *Craddock*, 166 Wash. App. at 447. In the present case, the County’s manner of enforcement shifts the cost of public policy to private landowners who purchase illegal lots in foreclosure sales, and fails to target any behavior or condition that contributes to the public problem.

* * *

ISSUE 3: Whether tax foreclosure sale without disclosure of illegal status deprives procedural due process because Chapter 84.64 RCW provides no mechanism to challenge the foreclosure and sale of illegal lots?

The Court of Appeals recently articulated the elements of procedural due process as follows:

Essential elements of procedural due process include notice and a meaningful opportunity to be heard. “A meaningful opportunity to be heard means ‘at a meaningful time and in a meaningful manner.’” To determine what procedural protections due process requires in a particular situation, a court must consider three factors: (1) the private interest affected, (2) the risk that the relevant procedures will erroneously deprive a party of that interest, and (3) any countervailing governmental interests involved.

Didlake v. Washington, 186 Wash. App. 417, 426, 345 P.3d 43, *review*

denied, 184 Wash. 2d 1009, 357 P.3d 667 (2015); citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Factors “1” and “3” are coextensive with factors governing substantive due process at least in the present case: the “private interest affected” is coextensive with “economic loss suffered by the property owner;” and “countervailing governmental interests” are coextensive with the “harm sought to be avoided.” These factors were addressed above; hence, we move to the risk that the relevant procedures erroneously deprived the plaintiffs of a private interest. Challenges under Chapter 84.64 include: statutes of limitation, priority of liens, and various challenges to tax title. Such remedies do not include rescission or any other remedy which would restore the plaintiffs to their position but for the County’s failure to disclose illegal lot status prior to the foreclosure sale. Hence, if RCW 58.17.210 does not apply, then the plaintiffs have been denied procedural due process because Chapter 84.64 RCW affords no mechanism to challenge foreclosure sale of illegal lots.

* * *

ISSUE 4: Whether tax foreclosure sale without disclosure of illegal status violates the *Civil Rights Act*?

The *Civil Rights Act* mandates damages for deprivation of rights,

privileges and immunities protected by the U.S. Constitution:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. §1983. The Washington Supreme Court, in *Sintra*, articulated the elements of a claim under the *Act*:

There are only two essential elements in a §1983 action: (1) the plaintiff must show that some person deprived it of a federal constitutional or statutory right; and (2) that person must have been acting under color of state law. . . . A local government is a “person” for purposes of 1983. . . . Land use disputes, including takings claims, are an appropriate subject of §1983 actions.

Sintra, 119 Wash.2d at 11. The U.S. Supreme Court recognizes that “[t]he right . . . to devote . . . land to any legitimate use is property within the protection of the Constitution.” *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121, 49 S. Ct. 50, 52, 73 L. Ed. 210 (1928). The Washington Supreme Court holds that “[t]he right to use and enjoy land is a property right.” *Mission Springs v. Spokane*, 134 Wash.2d 947, 962, 954 P.2d 250 (1998).

Plaintiffs have been denied the right to devote their property to the use for which it is zoned, “residential living in the rural area,” by the County’s act

of enforcing *Tax Foreclosure Statutes* and *Nonconforming Lot Ordinances* without disclosure of illegal lot status previously determined and evidenced only in County records. Clark County was clearly acting under color of state law: Chapter 84.64 RCW and CCC 40.530.010(C)(1)(b) implementing the *Subdivision Act*, Chapter 58.17 RCW. By analogy to the *Administrative Procedures Act*, “agency action” is defined by the legislature to include “the implementation or enforcement of a statute.” RCW 34.05.010(3). “The legality of the act of the officials is subject to review, as well as their alleged arbitrary and capricious conduct,” even without express provision in a governing ordinance. *Cosmopolis Consolidated School District No. 99 v. Bruno*, 59 Wash.2d 366, 369, 367 P.2d 995 (1962). Such conduct does not escape review simply because injury was caused by the *manner* of enforcing distinct statutes, which satisfy constitutional requirements individually. Plaintiffs damages are equal to their purchase price, \$28,600, plus pre-judgment interest at the statutory rate of 12% per annum because their damages are liquidated. *Coulter v. Asten Group*, 155 Wash.App. 1, 12, 230 P.3d 169 (2010). Such damages are also mandated under the *Subdivision Act*, in which the subject of the discretionary verb “may” is the purchaser, not the court; hence, the discretion lies with the purchaser. RCW 58.17.210.

Summary Judgment

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” CR 56(c). A material fact is one upon which the outcome of the litigation depends in whole or part. *Samis Land v. Soap Lake*, 143 Wash.2d 798, 803, 23 P.3d 477 (2001); *Atherton Condominium Apartment-Owners Association v. Blume Development*, 115 Wash.2d 506, 516, 799 P.2d 250 (1990). A genuine issue of material fact exists if reasonable minds could differ regarding the facts controlling the outcome of the litigation. *William G. Hulbert, Jr. and Clare Mumford Hulbert Revocable Living Trust v. Port of Everett*, 159 Wash.App. 389, 398, 245 P.3d 779, *review denied*, 171 Wash.2d 1024, 257 P.3d 662 (2011).

In the present case, all material facts are evident in title and administrative records. Plaintiffs right to rescind under RCW 58.17.210 is *not* conditioned upon innocence. *Newport Yacht Basin*, 168 Wash.App. at 73. Hence, the only material issue is whether the Tax Lot 27 was a legal lot of record when conveyed to the plaintiffs by the Clark County Treasurer.

This issue was resolved on July 24, 1998, when Clark County published a *Development Review Decision – LOT 98-033*, concluding that “Tax Lots 26 and 27 are ONE LEGAL LOT.” *CP 36, 43*. Mesne owners had an opportunity to legalize Tax Lot 27 under *Development Review Decision – PDR 98-030* (June 14, 1999) by boundary adjusting buildable area from Tax Lot 26, but defeated that opportunity by dividing/selling Tax Lot 26 separate from Tax Lot 27 on May 24, 2002. In any event, legalization under *PDR 98-0030* became unavailable when conditional approval expired unsatisfied on June 14, 2004. *CCC 40.520.010(F)(4), CP 36, 76*.

* * *

Attorney Fees

Damages, attorney fees and costs are provided to “purchasers and transferees” under the *Subdivision Act*:

All purchasers’ or transferees’ property shall comply with provisions of this chapter and each purchaser or transferee may recover his or her damages from any person, firm, corporation, or agent selling or transferring land in violation of this chapter or local regulations adopted pursuant thereto, including any amount reasonably spent as a result of inability to obtain any development permit and spent to conform to the requirements of this chapter as well as cost of investigation, suit, and reasonable attorneys’ fees occasioned thereby. Such purchaser or transferee may as an alternative to conforming his or her property to these requirements, rescind the sale or transfer and recover costs of investigation, suit, and

reasonable attorneys' fees occasioned thereby.

RCW 58.17.210.

The *Civil Rights Act* authorizes an award of attorney fees and costs as follows:

In any action or proceeding to enforce a provision of sections . . . 1983, . . . of this title, . . ., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . .

42 U.S.C. §1988. "Reasonable attorney fees are recoverable on appeal if allowed by statute, rule, or contract, and the request is made pursuant to RAP 18.1(a)." *Malted Mousse v. Steinmetz*, 150 Wash.2d 518, 535, 79 P.3d 1154 (2003). Plaintiffs are entitled to an award of attorney fees and costs incurred to date under the *Subdivision Act* and the *Civil Rights Act*, and hereby request an award under RAP 18.1(a).

* * *

CONCLUSION

The trial court should be reversed because all material facts are resolved by administrative and title records, and because plaintiffs are entitled to summary judgment as matter of law. Plaintiffs are entitled to damages or rescission under RCW 58.17.210 because there is no question that Clark County determined the property to be an illegal lot in 1998, prior to

foreclosing and selling to the plaintiffs in 2014. There is no conflict between the *Subdivision Act* and the *Tax Foreclosure Statute* because former does not forbid conveyance of illegal lots, it merely provides a remedy to the grantee, and the latter does not prohibit rescission of illegal lot sales.

In addition, foreclosure and conveyance of the subject property without disclosure of illegal lot status was unduly oppressive, and deprived the plaintiffs of substantive due process. All of the Stoebuck factors adopted by the Court in *Presbytery v. King County* favor the plaintiffs, whose purchase did not contribute to the public problem of deficient taxes nor illegal lots, plaintiffs' lot was both tax deficient and illegal prior to their purchase. The burden upon the plaintiffs is substantial (illegal lots must be terminated), while a less oppressive solution is readily available in County maintenance of a recording system for development review decisions, indexed by assessor's parcel number, and available for public review. There is no circumstance in which foreclosure-sale of illegal lots does not result in constitutional violation, except upon prior disclosure of illegal status. The combined enforcement of statute and ordinance without disclosure of illegal status utterly fails to serve the legitimate purpose of collecting tax deficiencies or regulating nonconforming lots because both purposes could

be fulfilled with equal efficiency if the County maintained a public index of legal lot determinations.

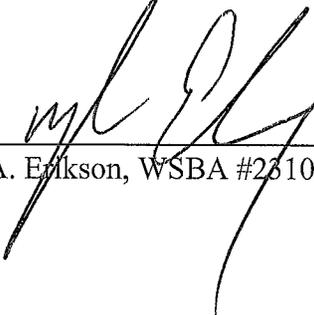
In addition, if *Subdivision Act* remedies are not available, plaintiffs were deprived procedural due process because Chapter 84.64 RCW provides no mechanism to challenge the foreclosure and sale of illegal lots.

The appellants request reversal and remand with instructions to enter judgment in favor of the appellants on all issues, included damages, rescission, costs, and attorney fees discussed above.

RESPECTFULLY SUBMITTED this 27th of June, 2016.

ERIKSON & ASSOCIATES, PLLC
Attorneys for the appellants

By:



Mark A. Erikson, WSBA #23106

CERTIFICATE OF SERVICE

#48653-9-II

I certify that on the 27th day of June, 2016, I caused a true and correct copy of the foregoing *Brief of Appellants* to be served on the following in the manner indicated below:

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By: 
Kris Eklove

West's Revised Code of Washington Annotated
Title 58. Boundaries and Plats (Refs & Annos)
Chapter 58.17. Plats--Subdivisions--Dedications (Refs & Annos)

West's RCWA 58.17.040

58.17.040. Chapter inapplicable, when
Currentness

The provisions of this chapter shall not apply to:

- (1) Cemeteries and other burial plots while used for that purpose;
- (2) Divisions of land into lots or tracts each of which is one-one hundred twenty-eighth of a section of land or larger, or five acres or larger if the land is not capable of description as a fraction of a section of land, unless the governing authority of the city, town, or county in which the land is situated shall have adopted a subdivision ordinance requiring plat approval of such divisions: PROVIDED, That for purposes of computing the size of any lot under this item which borders on a street or road, the lot size shall be expanded to include that area which would be bounded by the center line of the road or street and the side lot lines of the lot running perpendicular to such center line;
- (3) Divisions made by testamentary provisions, or the laws of descent;
- (4) Divisions of land into lots or tracts classified for industrial or commercial use when the city, town, or county has approved a binding site plan for the use of the land in accordance with local regulations;
- (5) A division for the purpose of lease when no residential structure other than mobile homes or travel trailers are permitted to be placed upon the land when the city, town, or county has approved a binding site plan for the use of the land in accordance with local regulations;
- (6) A division made for the purpose of alteration by adjusting boundary lines, between platted or unplatted lots or both, which does not create any additional lot, tract, parcel, site, or division nor create any lot, tract, parcel, site, or division which contains insufficient area and dimension to meet minimum requirements for width and area for a building site;
- (7) Divisions of land into lots or tracts if: (a) Such division is the result of subjecting a portion of a parcel or tract of land to either chapter 64.32 or 64.34 RCW subsequent to the recording of a binding site plan for all such land; (b) the improvements constructed or to be constructed thereon are required by the provisions of the binding site plan to be included in one or more condominiums or owned by an association or other legal entity in which the owners of units therein or their owners' associations have a membership or other legal or beneficial interest; (c) a city, town, or county has approved the binding site plan for all such land; (d) such approved binding site plan is recorded in the county or counties in which such land is located; and (e) the binding site plan contains thereon the following statement: "All development and use of the land described herein shall be in accordance with this binding site plan, as it may be amended with the approval of the city, town, or county having jurisdiction over the development of such land, and in accordance with

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such other governmental permits, approvals, regulations, requirements, and restrictions that may be imposed upon such land and the development and use thereof. Upon completion, the improvements on the land shall be included in one or more condominiums or owned by an association or other legal entity in which the owners of units therein or their owners' associations have a membership or other legal or beneficial interest. This binding site plan shall be binding upon all now or hereafter having any interest in the land described herein.” The binding site plan may, but need not, depict or describe the boundaries of the lots or tracts resulting from subjecting a portion of the land to either chapter 64.32 or 64.34 RCW. A site plan shall be deemed to have been approved if the site plan was approved by a city, town, or county: (i) In connection with the final approval of a subdivision plat or planned unit development with respect to all of such land; or (ii) in connection with the issuance of building permits or final certificates of occupancy with respect to all of such land; or (iii) if not approved pursuant to (i) and (ii) of this subsection (7)(e), then pursuant to such other procedures as such city, town, or county may have established for the approval of a binding site plan;

(8) A division for the purpose of leasing land for facilities providing personal wireless services while used for that purpose. “Personal wireless services” means any federally licensed personal wireless service. “Facilities” means unstaffed facilities that are used for the transmission or reception, or both, of wireless communication services including, but not necessarily limited to, antenna arrays, transmission cables, equipment shelters, and support structures; and

(9) A division of land into lots or tracts of less than three acres that is recorded in accordance with chapter 58.09 RCW and is used or to be used for the purpose of establishing a site for construction and operation of consumer-owned or investor-owned electric utility facilities. For purposes of this subsection, “electric utility facilities” means unstaffed facilities, except for the presence of security personnel, that are used for or in connection with or to facilitate the transmission, distribution, sale, or furnishing of electricity including, but not limited to, electric power substations. This subsection does not exempt a division of land from the zoning and permitting laws and regulations of cities, towns, counties, and municipal corporations. Furthermore, this subsection only applies to electric utility facilities that will be placed into service to meet the electrical needs of a utility's existing and new customers. New customers are defined as electric service locations not already in existence as of the date that electric utility facilities subject to the provisions of this subsection are planned and constructed.

Credits

[2004 c 239 § 1, eff. June 10, 2004; 2002 c 44 § 1; 1992 c 220 § 27; 1989 c 43 § 4-123. Prior: 1987 c 354 § 1; 1987 c 108 § 1; 1983 c 121 § 2; prior: 1981 c 293 § 3; 1981 c 292 § 2; 1974 ex.s. c 134 § 2; 1969 ex.s. c 271 § 4.]

West's RCWA 58.17.040, WA ST 58.17.040

Current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature that take effect on or before July 1, 2016

West's Revised Code of Washington Annotated
Title 58. Boundaries and Plats (Refs & Annos)
Chapter 58.17. Plats--Subdivisions--Dedications (Refs & Annos)

West's RCWA 58.17.210

58.17.210. Building, septic tank or other development permits not to be issued for land divided in violation of chapter or regulations--Exceptions--Damages--Rescission by purchaser

Effective: June 10, 2010
Currentness

No building permit, septic tank permit, or other development permit, shall be issued for any lot, tract, or parcel of land divided in violation of this chapter or local regulations adopted pursuant thereto unless the authority authorized to issue such permit finds that the public interest will not be adversely affected thereby. The prohibition contained in this section shall not apply to an innocent purchaser for value without actual notice. All purchasers' or transferees' property shall comply with provisions of this chapter and each purchaser or transferee may recover his or her damages from any person, firm, corporation, or agent selling or transferring land in violation of this chapter or local regulations adopted pursuant thereto, including any amount reasonably spent as a result of inability to obtain any development permit and spent to conform to the requirements of this chapter as well as cost of investigation, suit, and reasonable attorneys' fees occasioned thereby. Such purchaser or transferee may as an alternative to conforming his or her property to these requirements, rescind the sale or transfer and recover costs of investigation, suit, and reasonable attorneys' fees occasioned thereby.

Credits

[2010 c 8 § 18005, eff. June 10, 2010; 1974 ex.s. c 134 § 10; 1969 ex.s. c 271 § 21.]

West's RCWA 58.17.210, WA ST 58.17.210

Current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature that take effect on or before July 1, 2016

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West's Revised Code of Washington Annotated
Title 84. Property Taxes (Refs & Annos)
Chapter 84.64. Lien Foreclosure (Refs & Annos)

West's RCWA 84.64.040

84.64.040. Prosecuting attorney to foreclose on request

Effective: July 28, 2013
Currentness

The county prosecuting attorney shall furnish to holders of certificates of delinquency, at the expense of the county, forms of applications for judgment and forms of notice and summons when the same are required, and shall prosecute to final judgment all actions brought by holders of certificates under the provisions of this chapter for the foreclosure of tax liens, when requested so to do by the holder of any certificate of delinquency: PROVIDED, Said holder has duly paid to the clerk of the court the sum of two dollars for each action brought as per RCW 84.64.120: PROVIDED, FURTHER, That nothing herein shall be construed to prevent said holder from employing other and additional counsel, or prosecuting said action independent of and without assistance from the prosecuting attorney, if he or she so desires, but in such cases, no other and further costs or charge whatever shall be allowed than the costs provided in this section and RCW 84.64.120: AND PROVIDED, ALSO, That in no event shall the county prosecuting attorney collect any fee for the services herein enumerated.

Credits

[2013 c 23 § 375, eff. July 28, 2013; 1961 c 15 § 84.64.040. Prior: 1925 ex.s. c 130 § 116; RRS § 11277; prior: 1903 c 165 § 1; 1899 c 141 § 14.]

<(Formerly: Certificates of delinquency)>

West's RCWA 84.64.040, WA ST 84.64.040

Current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature that take effect on or before July 1, 2016

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West's Revised Code of Washington Annotated
Title 84. Property Taxes (Refs & Annos)
Chapter 84.64. Lien Foreclosure (Refs & Annos)

West's RCWA 84.64.050

84.64.050. Certificate to county--Foreclosure--Notice--Sale
of certain residential property eligible for deferral prohibited

Effective: July 28, 2013
Currentness

(1) After the expiration of three years from the date of delinquency, when any property remains on the tax rolls for which no certificate of delinquency has been issued, the county treasurer must proceed to issue certificates of delinquency on the property to the county for all years' taxes, interest, and costs. However, the county treasurer, with the consent of the county legislative authority, may elect to issue a certificate for fewer than all years' taxes, interest, and costs to a minimum of the taxes, interest, and costs for the earliest year.

(2) Certificates of delinquency are prima facie evidence that:

(a) The property described was subject to taxation at the time the same was assessed;

(b) The property was assessed as required by law;

(c) The taxes or assessments were not paid at any time before the issuance of the certificate;

(d) Such certificate has the same force and effect as a lis pendens required under chapter 4.28 RCW.

(3) The county treasurer may include in the certificate of delinquency any assessments which are due on the property and are the responsibility of the county treasurer to collect. However, if the department of revenue has previously notified the county treasurer in writing that the property has a lien on it for deferred property taxes, the county treasurer must include in the certificate of delinquency any amounts deferred under chapters 84.37 and 84.38 RCW that remain unpaid, including accrued interest and costs.

(4) The treasurer must file the certificates when completed with the clerk of the court at no cost to the treasurer, and the treasurer must thereupon, with legal assistance from the county prosecuting attorney, proceed to foreclose in the name of the county, the tax liens embraced in such certificates. Notice and summons must be served or notice given in a manner reasonably calculated to inform the owner or owners, and any person having a recorded interest in or lien of record upon the property, of the foreclosure action to appear within thirty days after service of such notice and defend such action or pay the amount due. Either (a) personal service upon the owner or owners and any person having a recorded interest in or lien of record upon the property, or (b) publication once in a newspaper of general circulation, which is circulated in the area of the property and mailing of notice by certified mail to the owner or owners and any person having a recorded interest in or lien of record upon the property, or, if a mailing address is unavailable, personal service upon the occupant

A - 5

of the property, if any, is sufficient. If such notice is returned as unclaimed, the treasurer must send notice by regular first-class mail. The notice must include the legal description on the tax rolls, the year or years for which assessed, the amount of tax and interest due, and the name of owner, or reputed owner, if known, and the notice must include the local street address, if any, for informational purposes only. The certificates of delinquency issued to the county may be issued in one general certificate in book form including all property, and the proceedings to foreclose the liens against the property may be brought in one action and all persons interested in any of the property involved in the proceedings may be made codefendants in the action, and if unknown may be therein named as unknown owners, and the publication of such notice is sufficient service thereof on all persons interested in the property described therein, except as provided above. The person or persons whose name or names appear on the treasurer's rolls as the owner or owners of the property must be considered and treated as the owner or owners of the property for the purpose of this section, and if upon the treasurer's rolls it appears that the owner or owners of the property are unknown, then the property must be proceeded against, as belonging to an unknown owner or owners, as the case may be, and all persons owning or claiming to own, or having or claiming to have an interest therein, are hereby required to take notice of the proceedings and of any and all steps thereunder. However, prior to the sale of the property, the treasurer must order or conduct a title search of the property to be sold to determine the legal description of the property to be sold and the record title holder, and if the record title holder or holders differ from the person or persons whose name or names appear on the treasurer's rolls as the owner or owners, the record title holder or holders must be considered and treated as the owner or owners of the property for the purpose of this section, and are entitled to the notice provided for in this section. Such title search must be included in the costs of foreclosure.

(5) If the title search required by subsection (4) of this section reveals a lien in favor of the state for deferred taxes on the property under RCW 84.37.070 or 84.38.100 and such deferred taxes are not already included in the certificate of delinquency, the county treasurer must issue an amended certificate of delinquency on the property to include the outstanding amount of deferred taxes, including accrued interest. The amended certificate of delinquency must be filed with the clerk of the court as provided in subsection (4) of this section.

(6) The county treasurer may not sell property that is eligible for deferral of taxes under chapter 84.38 RCW but must require the owner of the property to file a declaration to defer taxes under chapter 84.38 RCW.

Credits

[2013 c 221 § 12, eff. July 28, 2013; 1999 c 18 § 7; 1991 c 245 § 25; 1989 c 378 § 37; 1986 c 278 § 64. Prior: 1984 c 220 § 19; 1984 c 179 § 2; 1981 c 322 § 4; 1972 ex.s. c 84 § 2; 1961 c 15 § 84.64.050; prior: 1937 c 17 § 1; 1925 ex.s. c 130 § 117; RRS § 11278; prior: 1917 c 113 § 1; 1901 c 178 § 3; 1899 c 141 § 15; 1897 c 71 § 98.]

<(Formerly: Certificates of delinquency)>

West's RCWA 84.64.050, WA ST 84.64.050

Current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature that take effect on or before July 1, 2016

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Revised Code of Washington Annotated
Title 84. Property Taxes (Refs & Annos)
Chapter 84.64. Lien Foreclosure (Refs & Annos)

West's RCWA 84.64.080

84.64.080. Foreclosure proceedings--Judgment--Sale--Notice--Form of deed--Recording

Effective: July 24, 2015

Currentness

- (1) The court must examine each application for judgment foreclosing a tax lien, and if a defense (specifying in writing the particular cause of objection) is offered by any person interested in any of the lands or lots to the entry of judgment, the court must hear and determine the matter in a summary manner, without other pleadings, and pronounce judgment. However, the court may, in its discretion, continue a case in which a defense is offered, to secure substantial justice to the contestants.
- (2) In all judicial proceedings for the collection of taxes, and interest and costs thereon, all amendments which by law can be made in any personal action in the court must be allowed. No assessments of property or charge for any of the taxes is illegal on account of any irregularity in the tax list or assessment rolls, or on account of the assessment rolls or tax list not having been made, completed, or returned within the time required by law, or on account of the property having been charged or listed in the assessment or tax lists without name, or in any other name than that of the owner, and no error or informality in the proceedings of any of the officers connected with the assessment, levying or collection of the taxes, vitiates or in any manner affects the tax or the assessment of the tax. Any irregularities or informality in the assessment rolls or tax lists or in any of the proceedings connected with the assessment or levy of the taxes, or any omission or defective act of any officer connected with the assessment or levying of the taxes, may be, in the discretion of the court, corrected, supplied, and made to conform to the law by the court.
- (3) The court must give judgment for the taxes, interest, and costs that appear to be due upon the several lots or tracts described in the notice of application for judgment. The judgment must be a several judgment against each tract or lot or part of a tract or lot for each kind of tax included therein, including all interest and costs. The court must order and direct the clerk to make and enter an order for the sale of the real property against which judgment is made, or vacate and set aside the certificate of delinquency, or make such other order or judgment as in law or equity may be just. The order must be signed by the judge of the superior court and delivered to the county treasurer. The order is full and sufficient authority for the treasurer to proceed to sell the property for the sum set forth in the order and to take further steps provided by law.
- (4) The county treasurer must immediately after receiving the order and judgment proceed to sell the property as provided in this chapter to the highest and best bidder. The acceptable minimum bid must be the total amount of taxes, interest, and costs.

(5) All sales must be made at a location in the county on a date and time (except Saturdays, Sundays, or legal holidays) as the county treasurer may direct, and continue from day to day (Saturdays, Sundays, and legal holidays excepted) during the same hours until all lots or tracts are sold. The county treasurer must first give notice of the time and place where the sale is to take place for ten days successively by posting notice thereof in three public places in the county, one of which must be in the office of the treasurer.

(6) Unless a sale is conducted pursuant to RCW 84.64.225, notice of a sale must be substantially in the following form:

TAX JUDGMENT SALE

Public notice is hereby given that pursuant to real property tax judgment of the superior court of the county of in the state of Washington, and an order of sale duly issued by the court, entered the day of, .., in proceedings for foreclosure of tax liens upon real property, as per provisions of law, I shall on the day of, .., at o'clock a.m., at in the city of, and county of, state of Washington, sell the real property to the highest and best bidder for cash, to satisfy the full amount of taxes, interest and costs adjudged to be due.

In witness whereof, I have hereunto affixed my hand and seal this day of, ..

Treasurer of

county.

(7) As an alternative to the sale procedure specified in subsections (5) and (6) of this section, the county treasurer may conduct a public auction sale by electronic media pursuant to RCW 84.64.225.

(8) No county officer or employee may directly or indirectly be a purchaser of the property at the sale.

(9) If any buildings or improvements are upon an area encompassing more than one tract or lot, the same must be advertised and sold as a single unit.

(10) If the highest amount bid for any separate unit tract or lot exceeds the minimum bid due upon the whole property included in the certificate of delinquency, the excess must be refunded, following payment of all recorded water-sewer district liens, on application therefor, to the record owner of the property. The record owner of the property is the person who held title on the date of issuance of the certificate of delinquency. Assignments of interests, deeds, or other documents executed or recorded after filing the certificate of delinquency do not affect the payment of excess funds to the record owner. In the event that no claim for the excess is received by the county treasurer within three years after the date of the sale, the treasurer must at expiration of the three year period deposit the excess in the current expense fund of the county, which extinguishes all claims by any owner to the excess funds.

(11) The county treasurer must execute to the purchaser of any piece or parcel of land a tax deed. The tax deed so made by the county treasurer, under the official seal of the treasurer's office, must be recorded in the same manner as other conveyances of real property, and vests in the grantee, his or her heirs and assigns the title to the property therein described, without further acknowledgment or evidence of the conveyance.

(12) Tax deeds must be substantially in the following form:

State of Washington)

) ss.

County of)

This indenture, made this day of,, between, as treasurer of county, state of Washington, party of the first part, and, party of the second part:

Witnesseth, that, whereas, at a public sale of real property held on the day of,, pursuant to a real property tax judgment entered in the superior court in the county of on the day of,, in proceedings to foreclose tax liens upon real property and an order of sale duly issued by the court, duly purchased in compliance with the laws of the state of Washington, the following described real property, to wit: (Here place description of real property conveyed) and that the has complied with the laws of the state of Washington necessary to entitle (him, or her or them) to a deed for the real property.

Now, therefore, know ye, that, I, county treasurer of the county of, state of Washington, in consideration of the premises and by virtue of the statutes of the state of Washington, in such cases provided, do hereby grant and convey unto, his or her heirs and assigns, forever, the real property hereinbefore described.

Given under my hand and seal of office this day of, A.D.....

....

County Treasurer.

Credits

[2015 c 95 § 12, eff. July 24, 2015; 2004 c 79 § 7, eff. June 10, 2004; 2003 c 23 § 5, eff. July 27, 2003. Prior: 1999 c 153 § 72; 1999 c 18 § 8; 1991 c 245 § 27; 1981 c 322 § 5; 1965 ex.s. c 23 § 4; 1963 c 8 § 1; 1961 c 15 § 84.64.080; prior: 1951 c 220 § 1; 1939 c 206 § 47; 1937 c 118 § 1; 1925 ex.s. c 130 § 20; RRS § 11281; prior: 1909 c 163 § 1; 1903 c 59 § 5; 1899 c 141 § 18; 1897 c 71 § 103; 1893 c 124 § 105; 1890 p 573 § 112; Code 1881 § 2917. Formerly RCW 84.64.080, 84.64.090, 84.64.100, and 84.64.110.]

<(Formerly: Certificates of delinquency)>

West's RCWA 84.64.080, WA ST 84.64.080

Current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature that take effect on or before July 1, 2016

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KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted Limited on Preemption Grounds by Molinelli-Freytes v. University of Puerto Rico, D.Puerto Rico, July 27, 2010

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights (Refs & Annos)
Subchapter I. Generally

42 U.S.C.A. § 1983

§ 1983. Civil action for deprivation of rights

Effective: October 19, 1996

Currentness

<Notes of Decisions for 42 USCA § 1983 are displayed in six separate documents. Notes of Decisions for subdivisions I to IX are contained in this document. For additional Notes of Decisions, see 42 § 1983, ante.>

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CREDIT(S)

(R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub.L. 104-317, Title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

42 U.S.C.A. § 1983, 42 USCA § 1983

Current through P.L. 114-165.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights (Refs & Annos)
Subchapter I. Generally

42 U.S.C.A. § 1988

§ 1988. Proceedings in vindication of civil rights

Effective: September 22, 2000
Currentness

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

CREDIT(S)

(R.S. § 722; Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641; Pub.L. 96-481, Title II, § 205(c), Oct. 21, 1980, 94 Stat. 2330; Pub.L. 102-166, Title I, §§ 103, 113(a), Nov. 21, 1991, 105 Stat. 1074, 1079; Pub.L. 103-141, § 4(a), Nov. 16, 1993, 107 Stat. 1489; Pub.L. 103-322, Title IV, § 40303, Sept. 13, 1994, 108 Stat. 1942; Pub.L. 104-317, Title III, § 309(b), Oct. 19, 1996, 110 Stat. 3853; Pub.L. 106-274, § 4(d), Sept. 22, 2000, 114 Stat. 804.)

42 U.S.C.A. § 1988, 42 USCA § 1988
Current through P.L. 114-165.

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40.520.010 Legal Lot Determination

A. Purpose and Summary.

1. The purpose of this section is to provide a process and criteria for determining whether parcels are lots of record consistent with applicable state and local law, and to include a listing of potential remedial measures available to owners of property which do not meet the criteria.
2. In summary, parcels are lots of record if they were in compliance with applicable laws regarding zoning and platting at the time of their creation. Zoning laws pertain primarily to the minimum lot size and dimensions of the property. Platting laws pertain primarily to the review process used in the creation of the lots. Specific provisions are listed herein.

B. Applicability.

The standards of this section apply to all requests for lot determinations, or for building permit, placement permit, site plan review, short plat, subdivision, conditional use permit, rezone, or comprehensive plan change application.

C. Determination Process.

Lot of record status may be formally determined through the following ways:

1. Lot Determinations as Part of a Building Permit or Other Development Request. Building or other development applications for new principal structures on parcels which are not part of a platted land division shall be reviewed by the county for compliance with the criteria standards of this section, according to the timelines and procedures of the building permit or other applicable review involved. Lot determination fees pursuant to Title 6 shall be assessed, unless the parcel was recognized through a previous lot determination or other review in which such recognition was made. Lot determination fees will be assessed for placement or replacement of primary structures. A separate written approval will not be issued unless requested by the applicant. Request for determinations based on the innocent purchaser or public interest exception criteria of this chapter shall require separate submittal under Section 40.520.010(C)(2).
2. Lot Determinations Requests Submitted Without Other Development Review. Requests for determinations of lot of record status not involving any other county development reviews, or any requests for innocent purchaser or mandatory public interest exceptions shall submit an application for lot determination, with fees assessed pursuant to Title 6 of this code. A Type I process per Section 40.510.010 shall be used, unless the request is based on the public interest exception discretionary criteria of Section 40.520.010(F)(3), in which case Type II reviews as per Section 40.510.020 will be used. The county will issue a letter of determination in response to all such requests.

(Amended: Ord. 2008-06-02)

D. Application and Submittal Requirements.

1. The following shall be submitted with all applications for lot determination, or applications for other development review in which a lot determination is involved. Applicants are encouraged to submit material as necessary to demonstrate compliance with this section.
 - a. Prior county short plat, subdivision, lot determination or other written approvals, if any, in which the parcel was formally created or determined to be a lot of record;
 - b. Sales or transfer deed history dating back to 1969;
 - c. Prior segregation request, if any;
 - d. Prior recorded survey, if any;
 - e. At the discretion of the applicant, any other information demonstrating compliance with criteria of this section.
2. Requests for the innocent purchaser exception shall also include a written explanation of the circumstances surrounding the purchase of the property which demonstrates compliance with innocent purchaser criteria of Section 40.520.010(F)(1). Additional documentation such as earnest money agreements, written affidavits, previous tax statements or property advertisements may be included at the discretion of the applicant.
3. Requests for the public interest exception shall also include a written explanation which demonstrates compliance with applicable public interest exception criteria of this chapter.

E. Approval Criteria.

1. Basic Criteria. Parcels which meet both of the following basic criteria are lots of record:
 - a. Zoning. The parcel meets minimum zoning requirements, including lot size, dimensions and frontage width, in effect currently or at the time the parcel was created; and
 - b. Platting.
 - (1) The parcel was created through a subdivision or short plat recorded with Clark County; or
 - (2) The parcel is five (5) acres or more in size and was created through any of the following:
 - (a) An exempt division which occurred prior to April 19, 1993,
 - (b) A tax segregation requested prior to April 19, 1993,
 - (c) A survey completed as to boundaries prior to April 19, 1993, and

recorded prior to July 19, 1993; or

- (3) The parcel was created through a division or segregation of four (4) or fewer lots requested prior to July 1, 1976; or
 - (4) The parcel was created through division or segregation and was in existence prior to August 21, 1969; or
 - (5) The parcel was created through court order, will and testament, or other process listed as exempt from platting requirements by RCW 58.17.035, 58.17.040, or Section 40.540.010(A), or through an exemption from platting regulations provided by law at the time of creation of the parcel; or
 - (6) The parcel was segregated at any time and is twenty (20) acres or more in size.
2. Prior Determination. Parcels which have been recognized through a previous lot determination review, or other county planning approval in which lot recognition is made, are lots of record. Such parcels shall remain lots of record until changed by action of the owner.
 3. Dormant territorial plats lots created through land divisions which were recorded prior to 1937, and not subsequently developed or improved shall not be considered legal lots of record under the basic criteria of Section 40.520.010(E) (1)(b), although they may be recognized if they meet other approval criteria of this chapter.
 4. Parcels created as a result of government condemnation for road construction under Section 40.540.020(B)(4)(c) do not qualify as legal lots in the Columbia River Gorge National Scenic Area District, as specified under the definition of "parcel" in Section 40.240.040.

(Amended: Ord. 2004-06-11; Ord. 2005-04-12; Ord. 2007-06-05)

F. Exceptions.

1. Innocent Purchaser Exception. The responsible official shall determine that parcels which meet both of the following exception criteria are lots of record:
 - a. Zoning. The parcel meets minimum zoning dimensional requirements, including lot size, dimensions and frontage width, which are currently in effect or in effect at the time the parcel was created; and
 - b. Platting. The current property owner purchased the property for value and in good faith, and did not have knowledge of the fact that the property acquired was divided from a larger parcel after August 21, 1969, in the case of subdivisions, or after July 1, 1976, in the case of short plats, or after April 19, 1993, in the case of any segregation resulting in parcels of five (5) acres or larger.
2. Public Interest Exception, Mandatory. The responsible official shall determine

that parcels which meet the following criteria are lots of record:

- a. Date of Creation. The lot was created before January 1, 1995;
 - b. Zoning. The parcel meets minimum zoning dimensional requirements currently in effect, including lot size, dimensions and frontage width; and
 - c. Platting.
 - (1) The responsible official determines that improvements or conditions of approval which would have been imposed if the parcel had been established through platting are already present and completed; or
 - (2) The property owner completes conditions of approval such as, but not limited to, road, sidewalk, and stormwater improvements which the responsible official determines would otherwise be imposed if the parcel had been established through platting under current standards. Preliminary and final submittal plans and fees shall be required where applicable. Such plans may include final engineering plans and a final land division plan in lieu of a final plat.
3. Public Interest Exception, Discretionary. The responsible official may, but is not obligated to, determine that parcels meeting the following criteria are lots of record:
- a. Zoning. The parcel lacks sufficient area or dimension to meet current zoning requirements but meets minimum zoning dimensional requirements, including lot size, dimensions and frontage width, in effect at the time the parcel was created; and
 - b. Platting.
 - (1) The responsible official determines that conditions of approval which would have been imposed if the parcel been established through platting under current standards are already present on the land; or
 - (2) The property owner completes conditions of approval such as, but not limited to, road, sidewalk, and stormwater improvements which the responsible official determines would otherwise be imposed if the parcel had been established through platting under current standards. Preliminary and final submittal plans and fees shall be required where applicable. Such plans may include final engineering plans and a final land division plan in lieu of a final plat.
 - c. The responsible official shall apply the following factors in making a lot of record determination under the discretionary public interest exception:
 - (1) The parcel size is generally consistent with surrounding lots of record within one thousand (1,000) feet;
 - (2) Recognition of the parcel does not adversely impact public health or safety;

- (3) Recognition of the parcel does not adversely affect or interfere with the implementation of the comprehensive plan; and
 - (4) The parcel purchase value and subsequent tax assessments are consistent with a buildable lot of record.
4. Recognition of lot of record status based on the public interest exception shall be valid for five (5) years from the date of lot determination or review in which the determination was made. If a building or other development permit is not sought within that time, the determination will expire. Applications for development or lot recognition submitted after five (5) years shall require compliance with applicable standards at that time.

(Amended: Ord. 2009-03-02)

G. De Minimis Lot Size Standard.

For the purposes of reviewing the status of pre-existing lots for compliance with platting and zoning standards, parcels within one percent (1%) of minimum lot size requirements shall be considered in compliance with those standards. Parcels within ten percent (10%) of lot size standards shall be similarly considered in compliance unless the responsible official determines that public health or safety impacts are present.

H. Potential Remedial Measures.

Transfer or sale of properties created in violation of land division regulations is a gross misdemeanor pursuant to RCW 58.17.300. Buyers of property not in compliance with lot of record criteria, including exceptions, listed in this section may consider pursuing one (1) or more of the following, listed in no particular order:

1. Purchase of additional land from surrounding properties if necessary to reach compliance with zoning standards, and subsequent boundary line adjustment which does not result in any other parcels becoming inconsistent with minimum zoning standards.
2. Private action to seek damages, including the cost of investigation and suit from the selling party if the property was transferred in violation of applicable zoning and platting regulations, as authorized by RCW 58.17.210.
3. Private action to rescind the sale or transfer, and recover cost of investigation and suit from the selling party if the property was transferred in violation of applicable zoning and platting regulations, as authorized by RCW 58.17.210.
4. Application for a variance if necessary to reach compliance with zoning standards. Such applications will be reviewed solely under variance criteria of Section 40.550.020, and shall not be granted on the basis of illegal lot status.
5. Application for zoning changes under Section 40.560.020 and/or comprehensive plan changes under Section 40.560.010 if an alternative designation can bring the parcel into lot of record status. Such plan and zone change requests shall be reviewed solely according to their compliance with respective criteria of Section

40.560.020 and/or Section 40.560.010, and shall not be granted on the basis of illegal lot status.

Compile Chapter

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40.540.020 Land Division – Introduction

- A. Purpose. In addition to those purposes set forth in RCW 58.17.010, the following purposes are also essential to the regulation of the subdivision of land within the unincorporated areas of the county:
1. To promote the effective utilization of land;
 2. To make adequate provision for the housing, commercial, and industrial needs of the county;
 3. To prescribe procedures for the subdivision of land in accordance with officially adopted plans, policies, and standards, including the provisions of any adopted zoning ordinance; and
 4. To provide for the efficient processing of subdivision applications without undue delay.
- B. Applicability.
1. Plat, Short Plat or Other Review Required. All divisions of land, except those specifically listed in Section 40.540.020(B)(4), shall be subject to the provisions of the applicable portions of Chapter 58.17 RCW and this chapter.
 2. Agreement to Transfer Land After Preliminary Plat Approval. Agreements to transfer land prior to final plat or short plat is authorized; provided, that the performance of an offer or agreement to sell, lease or otherwise transfer a lot, tract or parcel of land following preliminary plat or short plat approval is expressly conditioned on the recording of the final plat or short plat containing the lot, tract or parcel.
 3. Redivisions. Any division of land occurring after June 20, 1989, which is exempt from review under RCW 58.17.040(2) and Section 40.540.020(B)(4)(b) shall not be further divided using the short plat process for a period of five (5) years following the date of such exempt division.
 4. Exemptions. The provisions of this chapter shall not apply to the following:
 - a. Cemeteries and burial plots while used for that purpose.
 - b. Divisions of land into lots or tracts, each of which is one thirty-second (1/32) of a section of land or larger, or twenty (20) acres or larger, if the land is not capable of description as a fraction of a section of land. For purposes of computing the size of any lot under this item which borders on a street or road, excluding limited-access streets or roads, the lot size shall be expanded to include that area which would be bounded by the centerline of the road or street, and the side lot lines of the lot running perpendicular to such centerline.
 - c. Divisions of land which are the result of the actions of governmental agencies, such as condemnation for road construction purposes.

- d. Divisions of land made by testamentary provisions, or the laws of descent.
- e. Divisions of land into lots or tracts classified for industrial or commercial use, when the responsible official has approved a "binding site plan" for use of the land in accordance with Section 40.520.040(B).
- f. Divisions of land made for the purpose of lease when no residential structure other than mobile homes or travel trailers are permitted to be placed upon the land, when the responsible official has approved a "binding site plan" for the use of land in accordance with Section 40.520.040.
- g. Divisions of land made by subjecting a portion of a parcel or tract of land to Chapter 64.32 RCW.
- h. Divisions of land made by court order; provided, the divisions shall comply with all other provisions of the UDC.
- i. A boundary line adjustment pursuant to Section 40.540.010.
- j. A division for the purpose of leasing land for facilities providing personal wireless services while used for that purpose. "Personal wireless services" means any federally licensed personal wireless service. "Facilities" means unstaffed facilities that are used for the transmission or reception, or both, of wireless communication services including, but not necessarily limited to, antenna arrays, transmission cables, equipment shelters, and support structures.

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ERIKSON & ASSOCIATES LAW

June 27, 2016 - 3:34 PM

Transmittal Letter

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Case Name: Jespersen v Clark County et al

Court of Appeals Case Number: 48653-9

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