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NO. 51091-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

v.

CITY OF TUMWATER, a Washington Municipal Corporation;
PATRICK and PATRICIA QUINN; and BRETT and KARA DURBIN,
Respondents.

REPLY BRIEF OF APPELLANT

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I. Counter Statement of Issues:

- A. Did the trial court error by ruling that Vistas homeowners are relieved from their duty to maintain Cell 2 located on Lot "T" as provided by the unambiguous terms of the Vistas plat approval, maintenance agreement, easement and covenants applicable to their plat?
- B. Is the trial court's ruling inconsistent with the Tumwater Storm Water Municipal Code?
- C. Is Respondents' attempt to negate the plain language of the final plat of Vistas barred by LUPA?
- D. Does the Vested Rights Doctrine apply to the Tumwater Storm Water Ordinance and as a result the ordinance does not apply to Vistas?

II. Statement of the Case:

The Vistas at Somerset (hereinafter referred to as "Vistas") is a planned unit development which was approved by the City of Tumwater (hereinafter referred to as the "City") on March 15, 1995. It is comprised of twenty-four (24) residential lots located on Tumwater Hill in the City of Tumwater. Vistas storm water flows under the street from the Vistas to the Sunrise Ridge/The Highlands subdivision (hereinafter referred to as "SR/HSH. C.P. 361-379).

The developer of Vistas was required by the City to acquire an off-site easement within SR/HSH for Vistas storm water (Recorded under

Thurston County Auditor file number 9208190116, 9200190117 and 9208310223). The easement (s) provided that “the cost of any inspection, maintenance, improvement... shall be borne by Grantee.” CP 157-158.

The developer of Vistas was also required to enter into a storm water maintenance agreement with the city which required Vistas to maintain its storm water easement which is located on Lot “T” of SR/HSH. CP 141-144. The storm water agreement, however, did not specifically identify Cell 2 as Vistas responsibility.

The storm water easement required by the City and the storm water agreement were referenced on the face of the Vistas recorded plat at page 2 under “Notes”. C.P. 63-109, Exhibit “E”. Additionally, the “Notes” referenced covenants that required Vistas homeowners to maintain storm water facilities. C.P. 63-109, Exhibit “E”. Similarly, on the face of the SR/HSH plat it is noted that SR/HSH Homeowner’s Association will be responsible for maintenance of storm water facilities. It specifically references a storm water maintenance agreement. CP 316.

It is undisputed that Vistas has continuously used the easement area for their storm water drainage. SR/HSH’s developer reconstructed a portion of Vistas’ easement area now designated as Cell 2 and reconnected it to Vistas’ storm water drainage pipes. There is no evidence that any water,

other than Vistas, drains into Cell 2. Cell 2 is exclusively used for Vistas' storm water drainage. C.P. 140.

III. ARGUMENT

- A. **The Vistas homeowners' duty to maintain Cell 2 of the storm water facilities located on Lot "T" is set forth in unambiguous conditions of plat approval governing the Vistas subdivision.**

Pursuant to RCW 58.17.170, a subdivision shall be governed by the terms of approval of the final plat. Tumwater Municipal Code, (TMC 17.02.110) requires the City to comply with the terms of RCW 58.17. Therefore, the City must enforce restrictions imposed upon a subdivision as a condition of plat approval. *Jones v. Town of Hunts Point*, 166 WN.App.452, 458, 272 P.3d 853 (2011).

The conditions of plat approval, including the storm water easements and the storm water agreement between the City and Vistas, authorizes the City to give the Vistas homeowners notice of required maintenance and/or repairs. Initially, the City determined that Vistas should be responsible for its own storm water facilities. The City, however, then inexplicably changed their position and imposed the obligation to maintain Cell 2 solely upon SR/HSR. C.P. 155.

The City's position would require the Court to ignore the unambiguous language of the plat, storm water maintenance agreement and the original CCR's that were created during the development of Vistas subdivision. The plain language on the face of the Vistas plat map imposes the obligation for the maintenance of Vistas' storm water facilities upon the Vistas homeowners. C.P. 63-109, Exhibit "E".

The respondents fail to address the fact that Vistas is obligated to maintain their storm drainage facilities located in the easement area they were required to obtain as a condition of plat approval. They are in effect, asking the court to ignore the unambiguous language on the face of Vistas plat map.

The conditions of plat approval of the Vistas plat clearly set forth the duty of Vistas homeowners to maintain the storm water facilities within the storm water easement they own. Since the plat language is plain and unambiguous, it is dispositive. The court should, therefore, determine that Vistas does have an obligation to maintain its storm water facilities. This comports with the general rule that the burden of maintaining an easement lies with the holder of that easement rather than the owner of the servient estate. *Crystal Ridge Homeowners Association v. City of Bothell*, 182 Wn.2d 665, 672, 343 P.3d 746 (2015). Moreover, this comports with the express term of Vistas' storm water easement(s).

B. SR/HSR conditions of plat approval, storm water maintenance agreements and covenants do not extinguish the duty of Vistas to maintain the storm water facilities located on Lot "T"

The respondents assert that since on the face of the Phase III SR/HSR plat, it states the storm drainage easement on Lot "T" is to be relinquished upon the recording of the plat it was intended that Vistas' duty of maintenance of its storm water facilities would end. The respondents, however, fail to point out that the easement(s) were never relinquished. Vistas still uses the easement and only Vistas' storm water drains into Cell 2. C.P. 140.

Furthermore, the reference to relinquishment on the face of the Phase III SR/HSR plat is only with regard to one of three iterations of Vistas' storm water easement. The reference to relinquishment refers to only that document filed under auditor file number 920819116, which was subsequently amended. The amendments were filed under auditor file number 9208190117 and auditor file number 9108310223 in order to provide an amended legal description of the easement area and to clarify that the easement was a nonexclusive easement. C.P. 157-158. Thus, contrary to what is asserted by respondents, not only have the latter two versions of the easement not been relinquished but they were not intended to be relinquished or terminated.

Termination of easements is disfavored by the law. *City of Edmonds v. Williams*, 54 Wn.App. 632, 636, 774 P.2d 1241 (1989). The extent and

duration of all expressly granted easement is to be determined from the terms of the grant. *Zobrist v. Culp*, 95 Wn2d, 556, 561, 627 P2d 1308 (1981). In this case Vistas' storm water easement specifically provided how it would terminate. The easement provided that "[i]n the event Grantee, its successors or assigns, cease to use the storm water drainage detention facility for a period of 5 years, this easement and all of Grantees rights thereunder, shall terminate and revert to Grantor". C.P. 157, Exhibit 5. Vistas has continuously used its storm water easement and the easement has not terminated.

Easements can only be extinguished in certain circumstances. First, easements can be extinguished by the easement holder in an instrument that complies with the Statute of Frauds. Second, an easement can be extinguished when the owner of the servient estate uses the easement adversely. Next, an easement can be extinguished if the easement is abandoned. Finally, an easement can be extinguished simply when the dominate estate and the servient estate merge. See generally, *Hanna v. Margitan et.al*, 193 Wn.App. 596, 606, 373 P. 300 (2016). In this case Vistas' storm water easement has not and cannot be extinguished because it is referenced on the face of the plat.

Similarly, conditions of plat approval also cannot be extinguished, except in certain circumstances. RCW 58.17.215 provides that if someone wants

to alter a subdivision they must submit an application to amend. The court in *Hanna*, supra, held that absent compliance with RCW 58.17.215 changes to something depicted on a short plat are ineffective. In this case there has been no application to amend Vistas' plat. Respondent's position that the SR/HSH plat amended the Vistas plat is not supported by the record, statute or case law. Accordingly, Vistas' conditions of plat approval are still binding upon Vistas homeowners.

C. SR/HSH and Vistas both owe a duty to maintain the storm water drainage facilities located on Lot "T". SR/HSH has maintained Cell 1 located on Lot "U" and Cell 3 located on Lot "T". Vistas should maintain Cell 2.

Obviously, the terms of plat approval, easements, and storm water agreements entered into by the developers of both Vistas and SR/HSH provide that both developments should take care of their own storm water facilities. The law is clear that the joint use by a servient owner and the beneficiary of the servient estate for the purpose authorized by the easement gives rise to an obligation to contribute jointly to the cost reasonably incurred for repair and maintenance of the portion of the servient estate used in common. *Buck Mountain Owners' Association v. Prestwich*, 174 Wn. App. 702, 717, 308 P.3d 644 (2013)(citations omitted).

Buck Mountain is consistent with the *Restatement (Third) of Property: Servitudes Section 4.13(3) (1998)*. “Under the *Restatement* approach, in the absence of an agreement, joint use of an easement creates an obligation to share costs:

Joint use by the servient owner and the servitude beneficiary of improvements used in enjoyment of an easement or profit, or of the servient estate for the purpose authorized by the easement or profit, gives rise to an obligation to contribute jointly to the costs reasonably incurred for repair and maintenance of the servient estate or improvements used in common.

Buck Mountain, Id. at 718, citing Beneduci v. Valadares, 812 A.2d 41 (Conn. App. Ct. 2002). Accordingly, both Vistas and SR/HSB have an obligation to contribute jointly to the costs reasonably incurred for repair and maintenance of Lot “T”. SR/HSB has already paid for the maintenance and repair of Cell 1 located on “Lot U” and Cell 3 located on Lot “T”. C.P. 123-134, Exhibit 1. Vistas should pay for the cost reasonably incurred for the maintenance and repair of Cell 2.

D. The requirement of Vistas to maintain the easement they own is consistent with the Tumwater Municipal Code.

The Tumwater Municipal Code provides that if a developer wants to develop property and that property requires a storm water drainage system the developer’s subdivision shall be responsible for the continual operation, maintenance and repair of their storm water facilities. The

Respondents misconstrues the ordinance by asserting that person(s) holding title to the servient estate are responsible for required maintenance.

The ordinance is clear. TMC 13.12.020(D)(1)(a) specifies “the person(s) holding title to premises for which a storm water drainage system has been required are responsible the continual operation, maintenance and repair of said storm water (sic) facilities...” (emphasis added). The ordinance goes on to provide that the maintenance obligation shall be enforce against the owners of the property served by the storm water facilities. TMC 13.12.020(D)(1)(b).

The City takes TMC 13.12.020(D)(1)(b) out of context and disingenuously argues that a party served by the storm water facilities is a party benefited by the construction of the facility. The ordinance is, however, clear that property served by the storm water facility mean the premises for which a storm water drainage system has been required. Correspondingly, the maintenance and repair of Vistas’ storm water easement is the responsibility of the Vistas homeowners.

- E. SR/HSH is requesting that the conditions of plat approval for both Vistas’ plat and SR/HSH’s plat be enforced and therefore, the Land Use Partition Act does not bar the relief requested by the Appellant in this case.**

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

LUPA provides an aggrieved party with the right to pursue an appeal on an expedited basis. SR/HSB is not an aggrieved party since SR/HSB acknowledges and accepts the terms of their plat approval as binding.

The respondents have consistently maintained that the maintenance of Vistas' storm water facilities has to be entirely the responsibility of SR/HSB. They have, however, presented no creditable reason as to why the court should not recognize that both Vistas and the SR/HSB HOA owe a duty to maintain the storm water facilities on Lot "T".

SR/HSB takes the position that both Vistas terms of plat approval and SR/HSB's conditions of plat approval should be enforced. Therefore, SR/HSB do not seek to change conditions of plat approval and LUPA does not apply.

Vistas, however, seeks to change their conditions of plat approval. Vistas wants to modify the conditions of plat approval by eliminating Vistas'

duty to maintain its storm water facilities. Their claim is barred by LUPA and they are required to maintain their storm water facilities as a condition of plat approval.

F. The vested right doctrine provides that an applicant is subject to, and reviewed under, the land use statutes and ordinances in effect at the time the application is submitted. Local government cannot require an applicant to comply with ordinances that did not exist when an application was made unless the ordinance deals with a Federal or State mandate and does not involve a land use issue that involves local discretion.¹

A division of land under RCW 58.17.020 is to be considered under the subdivision or short subdivision ordinance and zoning or other land use control ordinances in effect at the time a fully completed application for preliminary plat approval has been submitted to the appropriate county, city or town official. *Snohomish County v. Pollution Control Hearings Board*, 187 Wn.2d 346, 386 P.3d 664 (2016) See also, TMC 15.44.040. The Supreme Court in *Snohomish County v. Pollution Control Hearings Board*, 187 Wn.2d 346, 386 P.3d 664 (2016) held that “land use control ordinances” means only those ordinances adopted as a matter of local discretion.

The court concluded that land use control ordinances do not include ordinances which implement a State or Federal mandate. The court went on to point out that the vested rights doctrine grew out of a concern that

¹ This issue has been first raised in Respondent’s reply brief.

municipalities were abusing their discretion with respect to land use and zoning rules. That concern is not, the court ruled, present in the storm water permit, as the State has mandated local governments to implement a storm water management program that may take the form of storm water regulations. *Snohomish County, Id. at 368.*

The Clean Water Act authorizes EPA and States, which are delegated the authority by EPA to regulate point sources that discharge pollutants into waters of the United States through the National Pollutant Discharge Elimination System (NPDES) permit program. The regulated point sources are referred to as “point sources” which are generated from a variety of municipal operations including storm water runoff from drainage systems. The NPDES Storm Water Program, in place since 1990, regulates activities, and those designated by the EPA due to water quality impacts.

The Tumwater Storm Water Ordinance (TMC 13.12.010) specifically references the NPDES. See TMC 13.12.010 (P), TMC 13.12.020(B)(6) and TMC 13.12.020(G)(3)(b). The Storm Water Ordinance deals with point sources and the responsibility for maintenance and repairs. TMC 13.12.020(D). The Tumwater Municipal Storm Water Ordinance is, therefore, not adopted as a matter of local discretion, but instead is implemented because of State and Federal mandates. Thus, the ordinance

is not a land use control ordinance and the vested right doctrine does not apply to the ordinance. The Storm Water Ordinance applies to Vistas and SR/HSH and the maintenance of a private storm water facility should be enforced against the property served by the storm water facility. In this case Cells 2 serves Vistas. Vistas should, therefore, be responsible for the maintenance and repair of Cell 2.

IV. CONCLUSION

Based upon the unambiguous terms of the Vistas and SR/HSH's conditions of plat approval both subdivisions are responsible for the maintenance and repair of their own storm water facilities. Vistas plat was not amended by the SR/HSH plat. The express terms of Vistas' storm water easement requires Vistas to maintain the easement. Additionally, TMC 13.12.020(D)(1)(a) specifies "the person(s) holding title to premises for which a storm water drainage system has been required are responsible for the continual operation, maintenance and repair of said stormwater (sic) facilities...." Furthermore, the ordinance provides that the maintenance obligation shall be enforced against the owners of the property served by the storm water facilities. TMC 13.12.020(D)(1)(b). Cells 1 and 3 serve and are maintained by SR/HSH. Cell 2 exclusively serves Vistas. Vistas should maintain and repair Cell 2.

Therefore, for all of the reasons set forth by the Appellant, the trial court committed reversible error by granting summary judgment for Respondents and denying summary for Appellant.

Respectfully submitted this 27th day of February, 2018.



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No. 51091-0-II

CERTIFICATE OF SERVICE

The undersigned certifies that on the 27th day of February, 2018, she caused a copy of
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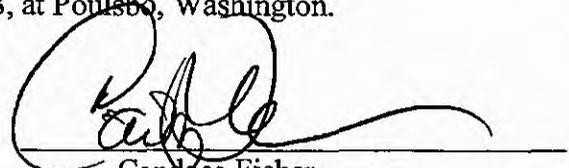
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I, Candace Fisher certify under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct.

DATED: February 27, 2018, at Poulsbo, Washington.



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