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I. INTRODUCTION

Brett and Kara Durbin (the “Durbins”) bought a home in the Vistas at Somerset (“Vistas”) plat, a plat that was final in 1995. Under established case law they vested to City of Tumwater (“City”) storm water rules that were in place in 1995. Sunrise Ridge/The Highlands at Somerset (“Highlands”) acknowledges that approximately 10 years afterwards the Vista’s simple detention pond was reconstructed by the Highlands developer and that the Highlands developer agreed in the final plat to maintain both two new cells (Cells 1 and 3) and the interconnected, reconstructed Vistas cell (Cell 2). Appellant’s Brief (“App. Br.”) at 7, 9. No Land Use Petition Act appeal was filed and the Highlands’ action is accordingly barred.

II. COUNTERSTATEMENT OF THE ISSUES

1. Can the Durbins be held responsible for new storm water maintenance responsibilities that were put in place after final plat approval for Vistas at Somerset Hill when the storm water facilities were totally rebuilt by the Highlands developer, and the Highlands final plat accepted such responsibilities?

2. Can the terms of plat approval for one planned unit development alter the terms of plat approval previously imposed upon

another planned unit development?

3. Does the Land Use Petition Act, Ch. 36.70C RCW, bar the Highlands' claim?

III. STATEMENT OF CASE

The Durbins bought a home in the Vistas at Somerset ("Vistas") plat, which was final in 1995. Under established case law the Durbins vested to City of Tumwater ("City") storm water rules that were in place in 1995. Approximately 10 years later the Vistas' simple detention pond was reconstructed by the Highlands developer and the Highlands developer agreed in the final plat to maintain both two new cells (Cells 1 and 3) and the interconnected, reconstructed Vistas cell (Cell 2). CP 139 and App. Br. at 7, 9. No Land Use Petition Act appeal was filed at the time challenging this plat condition.

The reconstruction of Cell 2 was a complete rebuild as to form and function. Michael Tennant, a Highlands contractor, testified in his deposition: "I enlarged Cell 2, installed ground water drains, a liner, and connected it to the regional storm water facility". CP 139. The Highlands assertion that the purpose of Cell 2 did not change is simply incorrect. App. Br. at 7. New City requirements added water treatment and quality

requirements to the 1995 basic storm water detention. Appendix to App.Br..

The Highlands acknowledge that the plain language of the notes and conditions of the third phase of the Highlands plat states that the Highlands Home Owners Association shall maintain all drainage easements, swales, ponds, conveyance ditches, storm facilities and all other appurtenances (App.Br. at 9), but argue that Cell 2 be exempted from this plat approval language for a lack of benefit to Highlands. App.Br. at 13. However, the benefit to Highlands was approval of its plat, no lengthy discussion with the Vistas was necessary, and no plat appeal by the Vistas was expected, an appeal which would have been more likely if different language had been used.

After Appellant filed this case against the City of Tumwater, the City brought in the Vistas as Third Party Defendants on August 31, 2016. On August 4, 2017 Judge Dixon issued an order granting summary judgement to the City and Respondents Durbin: “ordered, adjudged and decreed, that Sunrise Ridge/Highlands Homeowners Association should be responsible for the cost of maintaining Cell 2, located on Lot “T” of the Plat of Sunrise Ridge/Highlands at Somerset Hills”. CP 383.

IV ARGUMENT

A. Standard of Review

Summary judgement is only appropriate where, after reviewing all facts and reasonable inferences in the light most favorable to the non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgement as a matter of law based on the facts presented. *Viking Properties Inc. v. Holm*, 155 Wn.2d 112, 119 (2005).

B. Tumwater's Municipal Storm Water Ordinance Does Not Make The Vistas Liable For The Reconstructed Storm Water Facility.

The Highlands' reliance on to Tumwater Municipal Storm Water Ordinance (Section 13.12.020) is misplaced. When the Vistas plat was approved in 1995 the only part of this Ordinance that was in place was Ordinance No. 1099, April 7, 1987. Appendix to this Brief. Under established case law Vistas vested to City storm water rules that were in place in 1995. *Snohomish County v. Pollution Control Hearings Board*, 187 Wn.2d 346, 386, P. 3d 1064 (2016). In this case, the Supreme Court carved out an exception (for actions that are a result of state and not local action) to the basic rule that storm water regulations are land use control ordinances subject to the vesting statutes.

In order to get to this result the Court first pointed out that the legislature has never defined the term at issue in this case: 'land use

control ordinance'. *Id.* at 346. The Court then cited *Westside Business Park, LLC v. Pierce County*, 100 Wn.App. 599, 5 P.3d 713 (2000) noting:

The court in *Westside* adopted the definition of "land use control ordinance" from New Castle. There, the court held that the developer's 'bare bones' application vested to the county's storm water drainage ordinances in effect when the developer submitted the application.. Because the storm water drainage ordinances were a 'mandatory prerequisite' to permit approval, the court concluded that the ordinances were 'land use control ordinances'.

Snohomish County, 187 Wn.2d at 367.

It is undisputed that Highlands rebuilt the Vistas' simple detention pond and assumed responsibility for it on the face of a plat that was not appealed in a timely manner under the Land Use Petition Act. Thus, there was no genuine issue of material fact and the trial court was correct in granting judgement as a matter of law.

C. Vistas Cannot Be Held To Be Responsible For The Storm Water Facility That Was Totally Rebuilt By The Highlands To Meet New City Of Tumwater Storm Water Requirements And For Which The Highlands Accepted Maintenance Responsibility In Its Final Plat.

Throughout their brief, the Highlands acknowledge that the plain language of their final plat¹ requires them to be responsible for maintaining Cell 2 as well as all other storm water detention and water

¹ Highlands Final Plat Condition 6, "All drainage easements, swales, ponds, conveyance ditches, storm facilities and all other appurtenances shall be maintained by the Sunset Ridge/the Highlands at Somerset Hill Homeowner's Association." CP 328.

quality treatment facilities, but advance arguments as to why this plain language does not apply. App. Br. at 9. As noted above, the Highlands' reliance on and citation to Tumwater Municipal Storm Water Ordinance Section 13.12.020(D)(1)(a) is misplaced. When the Vistas plat was approved in 1995 the only part of this Ordinance that was in place was Ordinance No. 1099, April 7, 1987. By vesting in the City's storm water rules in place in 1995, the subsequent amendments cannot create additional liabilities for the Durbins. *Snohomish County*, 187 Wn. 2d at 386.

Second, the Highlands argue that they received no benefit from agreeing to Final Plat Condition 6. However, the benefit to Highlands was securing approval of its plat while avoiding a lengthy discussion with the Vistas and avoiding a plat appeal by the Vistas that likely would have followed if different storm water language had been used in the final Highlands plat.

Third, Appellant argues that Vistas has some form of "primary duty to maintain its own storm water facility." App. Br. at 13. However, the original storm water detention pond was completely rebuilt by Highlands and water quality features added. It no longer exists in the same form and function, having been subsumed in a large storm water treatment

facility that now serves about 200 homes and not just the 17 or so in the Vistas.

D. One Planned Unit Development Cannot Alter The Terms Of Plat Approval That Were Previously Imposed Upon Another Planned Unit Development.

Without any citation to authority, the Highlands argue that “an approved plat can only be appropriately altered by complying with the requirement of RCW 58.17.215.” App. Br. at 14. Adoption of this proposed new rule would simply rewrite subdivision practice around the State. The developer was completely within his rights to assume a new responsibility (for Vistas storm water detention) and add storm water treatment for Vistas in order to readily secure approval of his plat, to avoid a lengthy discussion with the Vistas, and to avoid a plat appeal by Vistas if different language storm water language had been used in the final Highlands plat.

E. The Land Use Petition Act Bars This Action As The Final Highlands Plat Explicitly Accepted Responsibility For All Storm Water Facilities And For Meeting City Storm Water Requirements That Were Not In Place When The Vistas At Somerset Hill Vested.

Again, the Highlands’ reliance on and citation to Tumwater Municipal Storm Water Ordinance (Section 13.12.020) is misplaced. The final plat condition language on storm water responsibilities was clear to the developer, the City, and those given public notice. The Land Use

Petition Act (“LUPA”), Ch. 36.70C RCW, was enacted to provide certainty in land use decisions and avoid actions such as this that attempt to rewrite plat conditions many years later.

The Highlands’ lawsuit is a straightforward attempt to amend the plain language of the plat so that maintenance responsibility for the storm water facilities is reassigned. LUPA provides the exclusive means of obtaining judicial review of land use decisions, such as plat terms and conditions, subject to statutory exceptions not applicable here. RCW 36.70C.030; *Twin Bridge Marine Park, LLC v. Dep’t of Ecology*, 162 Wn.2d 825, 854, 175 P.3d 1050 (2008). A land use petition is barred, and the court may not grant review, unless the petition is filed with the court and served on the parties within twenty-one days of the issuance of the land use decision. RCW 36.70C.040. In this case the Phase III the Highlands plat of the was executed and recorded on May 31, 2006, approximately 10 years before the highlands filed the current lawsuit. CP 58. Therefore, the Highlands attempt to challenge the effect of the plain language of its plat conditions in this case is barred by LUPA.

IV. CONCLUSION

Vistas at Somerset Hill cannot be held to be responsible for the storm water facility that was totally rebuilt by the Highlands to meet new

City of Tumwater storm water requirements and for which the Highlands accepted maintenance responsibility in the final plat. The requirements of RCW 58.17.215 are not the exclusive means of altering plats. An approved plat can be appropriately altered by explicit City action that is not subsequently challenged under the Land Use Petition Act. Finally, the Land Use Petition Act bars this action as the final Highlands plat explicitly accepted responsibility for all storm water facilities and for meeting City storm water requirements that were not in place when the Vistas at Somerset Hill vested. For the foregoing reasons, the trial court's order granting summary judgement should be upheld.

RESPECTFULLY SUBMITTED this 31st day of January, 2018



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APPENDIX

ORDINANCE NO. 1099

AN ORDINANCE declaring certain acts relating to the storm water system of the City of Tumwater to be unlawful and declaring penalties for violations thereof.

THE CITY COUNCIL OF THE CITY OF TUMWATER, STATE OF WASHINGTON, DOES ORDAIN AS FOLLOWS:

Section 1. It shall be unlawful for any person to drain or otherwise discharge into the City's storm water system, or to cause or permit to be drained or otherwise discharge into such storm water system any organic or inorganic matter that shall cause or tend to cause pollution of the system's receiving waters beyond that caused by normal and expected from streets and other impervious surfaces as a result of stormwater runoff or routine residential outdoor activities. For purposes of this section, organic or inorganic material shall specifically include oil or other petroleum products in quantities sufficient to cause unsightly or deleterious accumulations or produce color, odor or other conditions sufficient to be a nuisance. Included also are materials or combinations of materials which are toxic or harmful to human, animal, plant or aquatic life either by virtue of the nature of the matter itself or the effect the volume of said matter has on the receiving waters of the storm sewer system.

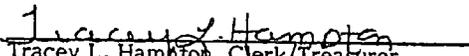
Section 2. Any person, firm or corporation found to be in violation of section 1 shall be guilty of a misdemeanor and shall be fined in an amount not to exceed \$5,000. In setting the amount of the fine, the court may take into account in addition to other factors normally considered, the previous history of the defendant regarding storm water violations, the severity of the violation's impact on public health and/or the environment and whether or not action has been taken by the State of Washington pursuant to RCW 90.48.144 to impose a civil penalty.

ADOPTED this 7th day of April, 1987.

CITY OF TUMWATER


P.H. Schmidt, Mayor

ATTEST:


Tracey L. Hampton, Clerk/Treasurer

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APPROVED AS TO FORM:


Thomas J. Taylor, City Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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, BRETT AND KARA
DURBIN

RESPONDENTS

No. 51091-0-II

CERTIFICATE OF SERVICE

BY _____
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The undersigned certifies that on the 30th day of January, 2018 I caused a copy of
the following document:

Respondent Durbins Reply Brief

To be served on the parties listed below by the method indicated:

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I, Ian Munce, certify under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct.

DATED: January 30, 2018 at Tacoma, Washington



Ian S. Munce