

No. 78707-7
SUPREME COURT
STATE OF WASHINGTON

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DAVID L. HORNBACK and SUSAN HORNBACK, husband and
wife,
Petitioners,

v.

KEN WENTWORTH and DIANE WENTWORTH, husband and
wife
Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF

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I. STANDARD OF REVIEW

The question of whether or not RCW 58.17.210 applies to the facts of this case is subject to a de novo standard of review. In re Estate of Baird, 131 Wn.2d 514, 517-18, 933 P.2d 1031 (1997). The trial court stated that the Hornbacks would be entitled to the relief provided by RCW 58.17.210 refused to apply the statute because there was no proof at trial of the statute in effect at the time the contract was executed in 1995. (CP 39). The standard of review is not an abuse of discretion standard for a discretionary decision as opined by the court of appeals majority because the trial court never considered any statute. The issue is did the trial court err in refusing to apply the statute. A de novo standard of review is the correct standard to determine if a statute applies. Even if an abuse of discretion was being reviewed, the trial courts refusal to grant the statutory remedies was an abuse of discretion. Thompson v. Hunstad, 53 Wn.2d 87, 91, 330 P.2d 1007 (1958). It was an abuse of discretion because Wentworths' failure to comply with the local uniform development regulations is the conduct the statue is intended to remedy. The court must apply applicable statutes and grant the statutory remedies.

- A. The Hornbacks were denied a development permit because the Wentworths failed to comply with local subdivision ordinances. May a trial judge ignore statutory or local ordinance remedies?

The proper statement before the court of appeals was the question: did the trial court commit error when he refused to apply RCW 58.17.210 and the Grant County 1976 Short Plat and Short Subdivision Ordinance (hereinafter the Ordinance) to the Hornbacks claim for relief. The majority in Hornback v. Wentworth¹ held the trial court has the discretion to disregard statutory remedies and may exercise inherent equity powers to disregard the statutory remedies. The dissent correctly points out that the trial judge refused to apply statutory rescission because there was no proof the contract violated a statute when it was entered into. (CP 39). The dissent concluded the refusal to apply the statutory remedies was error because RCW 58.17.210 and the Grant County ordinance remedies are not dependent on the timing of the execution of the contract but the inability to secure a building permit. The dissent also held that the statutory or local ordinance remedies were in addition to the right of rescission. The

¹ 132 Wn. App. 504 (2006).

dissent's holding is supported by Busch v. Nervik, 38 Wn. App. 541, 687 P.2d 872 (1984). The Hornback v. Wentworth majority decision conflicts with the public welfare expressed in RCW 58.17. et. seq., the supreme decision in Thompson v. Hunstad, supra and Division II's decision in Busch v. Nervik, id.

The legislature has determined that the public welfare and the public interest are best served by uniform laws and regulations in subdividing land. This statute also provides that the needs of the citizens of the State require proper ingress and egress, adequate water, sewerage, and other public requirements. RCW 58.17.010; see RCW 36.70A.010.² The legislature has therefore made it a matter of public policy that land must be subdivided in accordance with uniform development regulations. If such regulations are not followed then development permits may not be issued. RCW 58.17.210 states that the property conveyed to a purchaser or a transferee must conform to state or local development regulations to secure a building permit. In an effort to insure compliance with the statutes and local development regulations purchasers are granted authority to conform a subdivision to local regulations.

² Legislative Findings, Growth Management Act.

RCW 58.17.210. Transferees and purchasers are therefore authorized to bring the subdivision into compliance with the statute or local regulations to secure a development permit. The transferee may also elect to rescind the transaction. Busch v. Nervik, id. If the transferee elects the option of compliance the costs and expenses are recoverable from the transferor. If the transferee elects to rescind the transferee is entitled to recover costs, expenses and a reasonable attorney's fee from the transferor.

RCW 58.17.210. This statute is an expression of legislative intent to place the primary responsibility onto the subdivider. Prior to RCW 58.17.210 a failure to subdivide the property prior to sale did not subject the sale to a rescission action. This remedy was not available under the predecessor statute or at common law. Gilmore v. Hershaw, 83 Wn.2d 701, 704, 521 P.2d 934 (1974).

The legislature in enacting RCW 58.17.210 made a significant change in existing law. A legislative enactment changing existing law is an expression of new public policy. Spokane County Health District v. Brockett, 120 Wn.2d 140, 154, 839 P.2d 324 (1992).

The legislature therefore made it public policy that transferees situated as Hornbacks were are entitled to elect one of two

remedies, conform the property to local regulations or rescind the contract. The legislature also placed the ultimate burden of the costs, expenses and attorneys' fees on the transferor for failing to subdivide land in accordance with the state statutes or local regulations. The denial of the building permit to the Hornbacks resulting from Wentworth's failure to subdivide the property falls squarely within the core purpose of RCW 58.17.210. The holding in Hornback v. Wentworth that a court in equity may disregard the specific statutory remedies enacted to remedy transfer of illegally subdivided property eviscerates the statute and nullifies the legislative public policy expressed therein. It was the duty of the appeals court, and the trial court, to enforce the legislative purpose and intent. HJS Development, Inc., v. Pierce County, 148 Wn.2d 451, 471-472, 61 P.3d 1141 (2003). The legislation here was intended to supplement the common law and provide remedies not previously available to the transferee. Gilmore v. Hershaw, supra 705. The decision of the Hornback v. Wentworth court is in direct conflict with the legislative intent and purpose.

B. There Is An Inadequate Basis To Disregard The Statute. The basis on which the Hornback v. Wentworth majority disregarded the

statute is inadequate. The Hornback majority decision that the trial judge balanced the equities to disregard the statutory remedies is not supported by the record, nor may a court of equity disregard a statute as they opine. Thompson v. Hunstad, supra. The trial court simply refused to recognize the ordinance in effect at the time of execution of the contract. Further, the trial court did not make any findings that would support the conclusion of gross fraud that is necessary to disregard the statutory remedies. Beckendorf v. Beckendorf, 76 Wn.2d 457, 465, 457 P.2d 603 (1969); Thompson v. Hunstad, supra 91. The court of appeals' balancing of equities does not support a finding of gross fraud. The Wentworths did not plead fraud nor did the trial court consider fraud as an issue in this case. The court is not entitled to substitute what it believes is fair and equitable to overturn the public policy established by the legislature. The statutes and ordinance should be applied to award the Hornbacks the benefit of the statutory remedies provided by the legislature.

- C. Statutory Construction Is Erroneous. The statutory construction given to RCW 58.17.210 in Hornback v. Wentworth, Supra is incorrect and conflicts with Gilmore v. Hershaw, supra and Busch

v. Nervik, supra. It was the duty of the appellate court to interpret the language of the statute to give effect to its plain meaning and legislative intent. Am. Cont'l Ins. Co. v. Steen, 151 Wn.2d 512, 518, 91 P.3d 864 (2004). The court did not give effect to the plain meaning of the words in their context. The court interpreted the word “may” in the sentence

“Such purchaser or transferee *may* as an alternative to conforming his property to these requirements, rescind the sale or transfer and recover costs of investigation, suit, and reasonable attorneys’ fees occasioned thereby.”

to give the court discretion to disregard the statutory remedies in their entirety. This is incorrect. The word “may” is intended to permit the Hornbacks to elect between two remedies, the option to conform the property to the development regulations or in the alternative to elect to rescind the sale. The word “may” is permissive of what the Hornbacks could elect to do and is not intended to give the court permission to deny the statutory remedies. The election is for the purchaser or transferee to choose and not for the court to deny. The Hornbacks are entitled to elect their remedy to rescind and are entitled to recover their damages, costs of investigation, suit and reasonable attorney’s fees. In Gilmore v. Hershaw the court held that a vendee could choose to

conform the property to local regulations or to rescind the sale.

The appellate court decision here conflicts with Gilmore and vests the court with broad discretion to disregard the statutory remedies and take away the Hornbacks' statutory right to choose their remedy. The Gilmore court's plain reading of the statute correctly interprets the word "may", in its context, to grant the option to choose to the purchaser or transferee. The Gilmore courts interpretation is in accord with the language structure and the legislative intent to require prior compliance with the development statutes and regulations. The Gilmore interpretation should prevail over the court of appeals interpretation. The statutory remedies should then be awarded to the Hornbacks who chose to rescind.

D. Attorney's Fees On Appeal. The Hornbacks are also requesting they be awarded reasonable attorneys' fees for the appeal at the court of appeals level and at the Supreme Court level. RCW 58.17.210; the 1976 Ordinance § 34. If there is a statutory basis for fees at the trial court level then attorney's fees are awardable at the appellate level as well. The appellate court is therefore authorized to award reasonable fees on appeal. Chatterton v.

Business Valuation Research, Inc., 90 Wn.App. 150, 157, 951 P.2d 353 (1998); RAP 18.1(a).

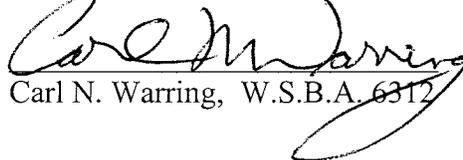
II. CONCLUSION

The Hornbacks request the Supreme Court grant the following relief:

1. Reverse the court of appeal's and trial court's decisions denying the relief provided by RCW 58.17.210 and the Grant County 1976 Short Plat and Short Subdivision Ordinance and remand to the trial court with instructions to grant the Hornbacks an award of damages, costs, expenses and reasonable attorney's fees.
2. Reverse the court of appeals and trial court and hold that the Hornbacks are entitled to interest at 12% per annum for each payment from the date it was made.
3. Award reasonable attorneys' fees and costs at the appellate court level and at the Supreme Court level.

Respectfully Submitted this 2nd day of February 2007.

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