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COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

**DAVID L. HORNBACK and SUSAN HORNBACK, husband and
wife,
Appellants/Plaintiffs,**

v.

**KEN WENTWORTH and DIANE WENTWORTH, husband and
wife
Cross Appellants/Defendants.**

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

David Hornback and Susan Hornback, the Plaintiffs in the trial court, request this court to accept review of the Court of Appeals, Division III decision terminating review designated in Part B of this petition.

II. SUMMARY OF DECISION FROM WHICH DISCRETIONARY REVIEW IS SOUGHT

The trial judge refused to grant RCW 58.17.210 rescission, damages and reasonable attorney's fees because the Plaintiffs failed to prove the contract violated a local development ordinance at the time the "contract was entered into". The court of appeals sustained the ruling of the trial judge on the grounds that the judge was balancing the equities of the parties and that the trial judge was not required to grant rescission as authorized by the statute. The court of appeals opinion holds the trial judge may disregard statutory rescission in favor of common law rescission. Chief Judge Dennis Sweeney dissenting stated the question before the court was not an abuse of discretion but whether or not RCW 58.17.210 applied to this case. He held that it did, and would remand for the trial judge to award costs and attorney's fees. A copy of the decision is in Appendix 1 at pages A-1 through A-10.

III. ISSUES PRESENTED FOR REVIEW

1. Are the Hornbacks entitled to statutory rescission, damages and attorney fees pursuant to RCW 58.17.210 (Appendix 2) and the Grant County Short Plat and Subdivision ordinance (Appendix 3) when the Hornbacks were unable to secure development permits as a result of the Wentworths failure to comply with local development regulations?
2. When the Hornbacks were denied a development permit because the Wentworths failed to comply with local regulations the trial judge was required to award RCW 58.17.210 remedies of rescission, damages and reasonable attorney's fees and/or the remedies of Section 34 of the Ordinance and may not exercise discretion and disregard the statutory and ordinance remedies.
3. When a real estate contract is rescinded does prejudgment interest commence for each payment on the date of the payment or on the date the buyer first demands rescission?
4. Do RCW 58.17.210 and Section 34 of the Grant County Short Plat and Short Subdivision ordinance authorize an award of attorney's fees on appeal?

IV. STATEMENT OF THE CASE

1. Procedural Statement of Case. The Hornbacks commenced this cause of action against the Wentworths on May 9, 2001 by filing a complaint against them. An Amended Complaint was filed on May 18, 2001 and thereafter served upon the Wentworths. (CP 122-133). The Defendants filed their Second Amended Answer on January 24, 2003. (CP 134-137). A bench trial to the Honorable Evan E. Sperline was held on September 27 and 28, 2004. The Honorable Evan E. Sperline personally prepared Findings of Fact and Conclusions of Law that were entered on October 6, 2004 without notice to either party. (CP 31 & 32-40). The Hornbacks filed a Motion to Reconsider the Findings of Fact and Conclusions of Law on October 12, 2004. (CP 41-42). The Wentworth's Motion for Reconsideration was filed on October 13, 2004. (CP 45-46). The Hornbacks then filed an Amended Motion on October 13, 2004. (CP 63-67). On January 28, 2005 the court entered an Order on the Motions for Reconsideration granting the motions in part but denying substantially all of the requested relief. (CP 106-107). The Hornbacks filed their Notice of Appeal on February 17, 2005. (CP 111-118). The Wentworths filed a Cross Notice of Appeal on February 24, 2005. The decision of the Court of Appeals was filed April 20, 2006.

2. Factual Statement of the Case. The Honorable Evan E. Sperline drafted detailed Findings of Fact. (CP 32-38) of the relevant factual circumstances and basis for this litigation. The Hornbacks adopt the Findings of Fact as their factual statement for purposes of this Petition for review. (Appendix 1).

V. ARGUMENT ON ISSUES OF LAW

A. Standard of Review. Whether or not a statute applies to an issue before the Supreme Court is a question of law. The standard of review of issues of law is de novo. In re Estate of Baird, 131 Wn. 2d 514, 517-18, 933 P.2d 1031 (1997). The Supreme Court should therefore conduct a de novo review of whether RCW 58.17.210 applies to this case.

B. Issues for Review

Issue 1 – Statutory Rescission. The Hornbacks sought rescission authorized by RCW 58.17.210 and as an alternative common-law rescission of their Real Estate Contract with the Wentworths. Statutory rescission was sought because the Hornbacks could not secure development permits for the lot they purchased from Wentworths. The alternative remedy of common law rescission was sought because the Wentworths had breached the contract and could not deliver merchantable title to the lot. A development permit could not be secured because the Wentworths had not subdivided or segregated the parent parcel as

provided by the Grant County 1976 Short Plat and Short Subdivision Ordinance (hereinafter the Ordinance). The trial judge awarded common law rescission of the Contract to the Hornbacks. (CP 108-110) but refused to grant rescission pursuant to RCW 58.17.210 or the Ordinance. Statutory rescission was denied on the grounds that the plaintiffs had failed to prove the contract violated any county ordinance "at the time it was entered into". (CP 39; CL 11). This was error because neither RCW 58.17.210 or the Ordinance limit the remedies available under the statute to sales where a development permit could not have been secured at the time the contract was formed. RCW 58.17.210 is not concerned with the date of sale but is concerned with a denial of a development permit because of a failure to comply with local development regulations. The Wentworths violated Section 5 of the Ordinance (Appendix 3, page A-16) by selling the Hornbacks a parcel without first subdividing the parent parcel.

a. Statutory Rescission Applies. The Hornbacks had applied for and were denied building permits and septic tank permits by the Grant County Planning Department. These permits were denied because the Wentworths had not subdivided or segregated the lot sold to the Hornbacks in accordance with the Ordinance. Proof that the Wentworths

failed to divide the parent parcel as provided by local regulations is established by any one of the following Findings of Fact (Appendix 1):

1. Their admissions the property was not segregated or divided. (CP 34-5, FF 10; CP 37, FF's 19 & 22).
2. FF 9 that Wentworths "had made no application to Grant County to segregate the parcel nor any other arrangement to obtain and provide a deed. (CP 34).
3. FF 15 that Security Title Guaranty's Preliminary Commitment identified the Hornback parcel as part of the Wentworth's parent parcel. (CP 36).
4. FF 17 that the Grant County Building Department wrote on development permit that the Hornbacks' 1.19 acres was to be segregated from the parent parcel of 5.82 acres. (CP 36 & Ex 9). Hornbacks also advised the segregation could not take place. (CP 36).
5. FF 22 that Wentworth's were unable to convey the property because they could not segregate (divide) the Hornback parcel. (CP 37).
6. The Hornbacks were unable to secure a development permit because the Wentworths had failed to divide the parent parcel. (CP 36, FF 17).

RCW 58.17.210 states in part:

"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 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."

The legislature has made it a matter of public policy that the onus of complying with local subdivision ordinances should be on the developer/owner. The public policy expressed by the legislature is

intended to favor the Hornbacks and provide greater protection to the buyer at the expense of the seller. The Wentworths had a duty to comply with the local regulations prior to selling the lot to Hornbacks. Section 5 and Section 31 of the Ordinance. (Appendix 3). Section 5 requires the filing of a short plat application if a parcel is to be divided for the purpose of sale or transfer. Section 31 makes it a misdemeanor to violate any provision of the ordinance.

The right of rescission for a violation of a subdivision statute or ordinance was not available as a remedy under the common law. Gilmore v. Hershaw, 83 Wn.2d 701, 705-6, 521 P.2d 934 (1974). RCW 58.17.210 created a remedy for a buyer who cannot secure a development permit. The legislature in creating the duty on the seller established a remedy of rescission, and recovery of damages, expenses of suit and reasonable attorney's fees. The buyers' election of the remedy of rescission for failing to comply with RCW 58.17.210 or local development regulations is mandatory. State ex Rel W. P. Breslin, v. Todd, 8 Wn.2d 482, 484, 113 P.2d 315 (1941). Hornbacks are therefore entitled to rescind the contract, recover damages, expenses of suit and reasonable attorney's fees.

b. Actual Notice of Local Regulations Provided to Trial Court. The trial court held the plaintiffs failed to prove the Ordinance was in effect in 1995. This is incorrect. Seventy-nine days prior to the hearing on the

parties' motions for reconsideration and prior to entry of judgment, the Plaintiff supplied proof to the court the Ordinance of 1976 as amended January 23, 1979 was the subdivision ordinance in effect in October of 1995. (CP 81) (Appendix 3). The Grant County Planning Department states in its letter it had searched its records and determined this was the ordinance in effect in October of 1995. This proof was attached to the Plaintiffs' Memorandum Regarding Motions For Reconsideration of the Findings of Fact and Conclusions of Law filed on November 10, 2004 together with a copy of the Ordinance. (CP 82-91). The Order On Motions For Reconsideration filed by Plaintiffs and Defendants (CP 106) and Judgment On Amended Complaint (CP 108-110) were entered seventy-nine days later on January 28, 2005. The Wentworths have not suggested or offered proof that there was some other ordinance that was in effect with which they did comply.

c. Judicial Notice of Local Ordinance Required. Ordinances and statutes are not ordinarily required to be admitted as evidence to prove it exists or does not exist, or to prove the effective date or the terms of the ordinance. CR 9(j). A copy of the Ordinance was submitted to the trial judge during the trial. (RP 24-26). The trial judge was directed to a copy of the Ordinance included in the Plaintiffs' three ring binder of Exhibits as Exhibit 21. The trial judge was required to take judicial notice of the

statute because the title of the ordinance and the date it was enacted was brought to the attention of the court. CR 9(j). The Grant County Superior Court has a special relationship to Grant County and should take notice of its local ordinances. Town of Forks v. Fletcher, 33 Wn. App. 104, 105, 652 P.2d 16 (1982).

Issue 2 - When the Hornbacks were denied a development permit because the Wentworths failed to comply with local regulations the trial judge was required to award RCW 58.17.210 remedies of rescission, damages and reasonable attorney's fees and/or the remedies of Section 34 of the Ordinance and may not exercise discretion and disregard the statutory and ordinance remedies.

a. Division III Holding. Division III's published opinion states that the trial judge in this case was exercising his equity powers to balance the equities between the parties when he refused to apply RCW 58.17.210. The appellate court further held the remedies are not mandatory and a trial judge has discretion to disregard the statutory remedies. This part of the opinion does not reflect the trial judge's decision. Judge Sweeney in his dissent states the trial judges decision as follows: "The trial judge concluded that the statutory rescission did not apply because the contract was not in violation of any county ordinance *'at the time it was entered into.'*" Never-the-less the opinion holds that the remedies of RCW

58.17.210 are not mandatory and the trial judge has the discretion to not award statutory rescission, damages and reasonable attorney's fees required by the statute. Division III's opinion is contrary to the plain language of the statute and is contradictory to Busch v. Nervik, 38 Wn. App. 541, 687 P.2d 872 (1984) and State ex Rel W. P. Breslin, v. Todd, supra. The legislature has expressed public policy regarding the subject matter of this suit. A court should give way to the public policy as expressed by the legislature in a statute and the statutory remedy should prevail when a new remedy is authorized by the statute. The legislature apparently believes it in the public's best interest to require seller's to comply with local development regulations by authorizing buyer's to recover their costs and expenses to comply with the regulations or to allow the buyers to rescind and recover damages and attorney's fees. Division III's holding is contrary to public policy expressed by the legislature in RCW 58.17.210.

b. The Plain Language of RCW 58.17.210 Makes Statutory Rescission, Damages and Reasonable Attorney's Fees Mandatory.

Division III interpreted the term "may" in the statute as granting discretionary authority to the judge to award statutory rescission, damages and reasonable attorney's fees. This is incorrect. The language of the statute being interpreted states:

... 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. (Emphasis added).

The italic '*may*' is an elective choice that permits the purchaser to choose between conforming the parcel purchased to local development regulations or rescinding the sale or transfer. The '*may*' is intended to entitle the buyer to elect his remedy. Gilmore v. Hershaw, 83 Wn.2d 701, 705-6, 521 P.2d 934 (1974). The use of the word *may* in this context is not intended to grant the trial judge discretion to deny the buyer the right to elect between the two options nor is it intended to permit the court to deny the buyer his remedy once elected. If the '*may*' is interpreted to authorize the trial judge discretion to deny the buyer statutory relief the buyer is denied the right to elect his remedy altogether. The Hornbacks have an express statutory the right to elect rescission. Busch v. Nervik, 38 Wn. App. 541, 546, 687 P.2d 872 (1984). None of the wording authorizes the trial judge to exercise discretion and vitiate the Hornback's election. The court should give the plain wording of RCW 58.17.210 the meaning that gives effect to its intent. In re R., 97 Wn.2d 182, 187, 641 P.2d 704 (1982). The court of appeals interpretation permits a trial judge to refuse to apply any remedy granted by RCW 58.17.210.

c. Section 34 of the 1976 Short Plat and Short Subdivision Ordinance Requires an Award of Damages, Costs of Suit and Reasonable Attorney's fees. Section 34 states "A transferee who cannot secure a building permit, septic tank permit or other developmental permit for the reason that his transferor failed to comply with any provision of this Ordinance may recover damages from his transferor, to include compensation for the loss of his bargain, actual costs of investigation and suit reasonable attorney's fees" This Ordinance is similar to RCW 58.17.210. The Ordinance provides the transferor may recover damages. The Ordinance also states the damages are "*to include*" loss of his bargain, actual costs of investigation and suit reasonable attorney's fees. The Ordinance authorizes damages and if damages are awarded, they must include the loss of the bargain, actual costs of investigation and reasonable suit attorney's fees. The trial judge was required to give effect to the intent and purpose of the ordinance for the same reasons stated in the preceding paragraph. In re R., id.

Issue 3 - When a real estate contract is rescinded does prejudgment interest commence for each payment on the date of the payment or on the date the buyer first demands rescission? The parties entered into a Real Estate Contract (hereinafter Contract) on October 31, 1995. The Hornbacks paid \$1,000.00 on October 12, 1995, \$9,000.00 on October 30,

1995 and \$5,000.00 was paid on August 30, 1999. The trial court granted the Hornbacks a rescission of the Contract and ordered the return of the three payments plus prejudgment interest from the date of rescission, October 20, 2000. The Hornbacks requested prejudgment interest of 12% on the \$1,000.00 payment to commence on October 12, 1995, interest on the \$9,000.00 payment to commence on October 30, 1995 and interest on the \$5000 payment to commence on August 30, 1999. The interest should be payable on each payment from the date the Wentworths received the payment as the amount of each payment is liquidated from the time the payment was made. Awarding the Hornbacks interest from the date of each payment more nearly places them in the status quo before they entered into the Contract because they receive the full time value use of their money. Colpe v. Lindblom, 57 Wash. 106, 115-116, 106 P. 634 (1910).

Issue 4 - Do RCW 58.17.210 and Section 34 of the Grant County Short Plat and Short Subdivision ordinance authorize an award of attorney's fees

on appeal? The Hornbacks requested an award of reasonable fees from the trial court as provided by RCW 58.17.210. Authority for an award of reasonable fees to the Hornbacks lies with the Ordinances and with RCW 58.17.210. Relief can be granted under both or either. Rescission was granted because the Wentworths had not divided/and or segregated the

parent parcel in compliance with local regulations. As a result Hornbacks' could not secure development permits for the parcel sold to them.

Hornbacks are requesting reasonable fees in the trial court and on appeal.

RCW 58.17.210. A statute that is the basis of an award of attorney's fees is also a basis for an award of attorney's fees in the appellate courts as well. Puget Sound Plywood, Inc. v. Mester, 86 Wn.2d 135, 144 P.2d 756 (1975).

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Decision in Conflict With Case Law, Statutes and Ordinance. The published decision of Hornback v. Wentworth No. 23842-3-III is a published split decision that conflicts with Gilmore v. Hershaw, 83 Wn.2d 701, 705-6, 521 P.2d 934 (1974), with Busch v. Nervik, 38 Wn. App. 541, 687 P.2d 872 (1984), In Re R., supra and legislative public policy expressed in RCW 58.17.210.

Prior to the 1969 enactment of RCW 58.17.210 neither the common law nor the predecessor statute RCW 58.16 provided rescission as a remedy when real property was sold in violation of subdivision statutes or ordinances. Gilmore v. Hershaw, supra, page 704. The court at page 705 of this decision held that RCW 58.17.210 gave a purchase the right to elect to conform his property to development regulations or to rescind the purchase. The Laws 1974 Ex.Sess., ch. 134 § 10 amended

RCW 58.17.210 to provide that a seller would be liable for damages for transferring or selling land in violation of RCW 58.17 or local regulations. Adding this language entitled a buyer to elect to rescind a purchase if it was sold in violation of local regulations. This statute and the amendments are an expression of the legislature's public policy that sellers prior to selling or transferring land must subdivide the real property in conformance with the statute or local regulations (either a subdivision or short subdivision) or suffer the consequences if a buyer cannot obtain a development permit. The statute does not require a breach of warranty, fraud or deception. The only requirement is that the buyer be denied a development permit because of a failure to comply with the statute or a local development ordinance. The Hornback v. Wentworth decision conflicts with RCW 58.17.210 because it permits a trial judge to disregard the public policy expressed by the legislature and deprive the Hornbacks of statutory rescission.

The Hornback v. Wentworth decision is also in conflict with Gilmore v. Hershaw, supra and with Busch v. Nervik, supra. Division III interpreted the term "may" in the statute as granting discretionary authority to the judge to award statutory rescission, damages and reasonable attorney's fees or deny the statutory relief altogether. This opinion conflicts with Gilmore v. Hershaw, supra which correctly holds

the buyer is given the right to elect to conform his property to the local regulations or to elect rescission and recover costs of suit, expenses and a reasonable attorney's fee. The Gilmore court correctly interprets the word may in the context of the statute to grant the buyer absolute discretion to elect his remedy. The current decision is contradictory of the Supreme Court decision in Gilmore v. Hershaw because it shifts the right of election from the buyer to a discretion of the trial judge to deny any relief.

The Busch v. Nervik, supra. Court held that the buyer was entitled to the remedy of RCW 58.17.210. The court also held the remedies of RCW 58.17.210 were in addition to any common law remedies. Division III's opinion is in conflict with the Busch court because it effectively holds that a buyer is not entitled to the statutory remedies. The courts decision effectively undercuts the Busch v. Nervik decision. In addition, the opinion conflicts with the State ex Rel W. P. Breslin, v. Todd, supra because it ignores the general rule set forth in that case that when a new right is granted by a statute the statutory remedy of the statute must be granted. RCW 58.17.210 granted new rights of rescission that the common law did not permit. The trial court should not have ignored the remedies of RCW 58.17.210

The Hornback v. Wentworth decision is a split decision. Judge Sweeney, the dissenting judge, in a short dissent points out the error of the

two judge majority. He points out that the question before the court was the application of RCW 58.17.210 to the present case, not whether the trial judge abused his discretion.

i. The legislature in enacting RCW 58.17.210 recognized that the division of real property is of substantial public interest. The increasing rate of population growth has fueled a greater need for subdivisions on which to build homes and businesses. Local jurisdiction pursuant to the mandate of growth management acts, environmental concerns, need for adequate clean water and sewer disposal have enacted increasingly complex development regulations. The legislature has placed the burden on sellers of parcels of land to comply with the development regulations. The seller developer is the only party who is in a position to file an application to insure a subdivision complies with development regulations. It is in the public interest that the courts decisions uphold the public policy of the legislature by requiring compliance with development regulations. The Hornback v. Wentworth decision, because it is a published, has a greater potential to defeat this purpose. Permitting a sale or transfer places before compliance with the subdivision statutes and ordinances has a great potential to cause substantial financial harm to each unwitting buyer. It is in the public interest to resolve any conflicts and establish a clear case law policy

interpreting RCW 58.17.210. One of the policies established to protect a buyer of a parcel not divided in compliance with local regulations is the right to rescind and secure damages and reasonable attorney's fees.

Hornback v. Wentworth defeats this purpose. Often the expenses of litigation equal, or greatly exceed, the purchase price the buyer is trying to recover and denies any of the relief envisioned by the legislature.

VII. CONCLUSION

The Hornbacks are requesting the court to grant the following relief:

1. Reverse the trial court and remand with instructions to the court to award the damages, expenses of suit and reasonable attorney's fees authorized by RCW 58.17.210 and Grant County 1976 Short Plat and Short Subdivision Ordinance.
2. Reverse the Court of Appeals decision that holds that a trial judge may disregard RCW 58.17.210 and Grant County 1976 Short Plat and Short Subdivision Ordinance.
3. Reverse the trial court with instructions that interest of 12% per annum should accrue from the date each installment payment was made.
4. Award the Hornbacks their court costs, suit expenses and reasonable attorney's fees in the court of appeals and the Supreme Court.

Respectfully Submitted this 16th day of May, 2006.

Warring Law Firm, P.S.
Attorneys for Appellants/Petitioners


Carl N. Warring, W.S.B.A. 6312

APPENDIX 1



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THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF GRANT

DAVID HORNBACK and SUSAN
HORNBACK, husband and wife,

Plaintiffs,

vs.

KEN WENTWORTH and DIANE
WENTWORTH, husband and wife,

Defendants.

NO. 01-2-00491-0

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

THIS MATTER came before the Court for bench trial on the 27th and 28th days of September, 2004, Plaintiffs DAVID HORNBACK and SUSAN HORNBACK personally appearing along with their counsel, Carl N. Warring, and Defendants KEN WENTWORTH and DIANE WENTWORTH personally appearing along with their counsel, Larry W. Larson; the Court having considered the testimony and exhibits admitted during trial, and the arguments of counsel, and being otherwise fully satisfied in the premises herein, now makes the following:

FINDINGS OF FACT

1. Plaintiffs DAVID HORNBACK and SUSAN HORNBACK ("Hornbacks") comprise a marital community residing in or near Moses Lake, Washington. Defendants KEN WENTWORTH and DIANE WENTWORTH ("Wentworths") comprise a marital community residing in or near Moses Lake, Washington. At all relevant times, it was the practice of Wentworths to spend 180 days each

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1 year, from October or November through April or May, residing in Mexico.

2 2. In 1986, Wentworths acquired a 10-acre parcel of undeveloped real property West of the City
3 of Moses Lake (Ex. 16). The parcel consists of a rectangle approximately 365 feet wide running
4 northerly 1320 feet from the north frontage road along Interstate 90 (Ex. 3). The parcel is bounded
5 on the East by proposed Road F N.E., which Wentworths developed as a gravel road.

6 3. In 1990, Wentworths sold the southerly 4 acres of the parcel to a developer, Sample. At
7 about the same time, Wentworths sold a parcel of approximately 1 acre to Snegosky (Ex. 17) by
8 means of segregation. Segregation of a single lot was permissible under the then applicable Grant
9 County subdivision ordinances. The ordinances permitted one segregation each 5 years, with a
10 minimum lot size of 1 acre, without compliance with platting procedures, so long as the newly created
11 lot would be occupied as a residence by its owners (Ex. 25). Wentworths had also segregated a
12 parcel from a Quincy-area farm as a residence for Ken Wentworth's son.

13 4. Wentworths had developed their residence in the area of about one acre, more or less, lying
14 between the parcels sold to Sample and Snegosky. As a consequence of the two sales, Wentworths'
15 remaining property consisted of two non-contiguous parcels sharing a single parcel number in County
16 records, that is, their residence parcel and the approximately 3.6 undeveloped acres lying northerly
17 of the Snegosky parcel.

18 5. In 1994, Wentworths experienced some flooding damage in their home and contacted
19 Hornbacks' business, Moses Lake Mobile Home Service, to complete some repairs. As a result of
20 this contact, Wentworths and Hornbacks became social friends. Their friendship continued through
21 1999.

22 6. During social contacts, Hornbacks expressed to Wentworths an interest in acquiring a rural
23 parcel, such as Wentworths enjoyed, on which to establish their home. As the parties discussed this
24 prospect in 1995, Wentworths indicated that the timing was right (five years since the Snegosky
25 segregation) to segregate off another lot of at least one acre. Wentworths showed Hornbacks the
26 northerly 3.6 acres, indicating they would divide it into 3 lots.

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FINDINGS OF FACT AND
CONCLUSIONS OF LAW - Page 2

1 7. After further discussions, the parties agreed that Hornbacks would purchase the middle of the
2 three lots for \$20,000, and that Wentworths would obtain and pay for a survey. Wentworths
3 obtained a survey from Boundary Engineering in Moses Lake (Ex. 3) in July, 1995, including a legal
4 description of the middle lot, consisting of approximately 1.19 acres.

5 8. During September, 1995, Wentworths prepared a rough draft of a written contract (Ex. 13)
6 which Hornbacks reviewed and approved. Ultimately, the parties reduced their agreement to a formal
7 written contract (Ex. 1) which they executed on October 31, 1995. They met at Washington Trust
8 Bank in Moses Lake, where their signatures on the contract were notarized, and where Hornbacks
9 paid Wentworths the remaining \$9000 (\$1000 earnest money had previously been paid) of the initial
10 \$10,000 payment required by the contract. Within a day or two, Wentworths departed for their
11 annual winter residence in Mexico.

12 9. Thereafter, neither Wentworths nor Hornbacks abided by the provisions of their written
13 contract. The contract required the final \$10,000 payment to be made in the form of a deposit to
14 Wentworths' bank account by January 10, 1996, but by that time, Hornbacks had encountered
15 financial difficulties in their business and were unable to pay. The contract required Hornbacks to
16 pay real property taxes as they became due, but they have never paid any taxes on their "lot." The
17 contract allowed Wentworths to pay taxes in Hornbacks' stead and add the amount to the contract
18 balance; Wentworths continued paying taxes on their entire parcel, but made no demand for
19 Hornbacks to pay them, nor added any amount to the contract balance when they later determined
20 a payoff amount. The contract required Wentworths to provide a statutory warranty deed upon
21 receipt of final payment (contractually due by January 10, 1996), but Wentworths were in Mexico
22 until Spring, had made no application to Grant County to segregate the parcel, nor any other
23 arrangement to obtain or provide a deed. The contract required Wentworths to obtain a title
24 insurance policy within ten days, but they made no attempt to do so, nor did Hornbacks pay any
25 attention to that provision.

26 10. Wentworths' intent at the time of the written contract was to complete the segregation and
27

1 provide a deed upon their return in May. Near the time of entering into the contract, Wentworths
2 telephoned the Grant County Planning Department and were advised that segregation was available
3 as a means of conveying a parcel of at least one acre to Hornbacks. Hornbacks had no experience
4 in selling or purchasing real estate and no familiarity with the process of segregation, the requirement
5 of excise tax, or recording contracts. Neither party filed their contract in public records, nor did
6 Wentworths pay real estate excise taxes.

7 11. When Wentworths returned from Mexico in 1996, Hornbacks discussed with them the
8 financial difficulties and consequent litigation experienced by Hornbacks in their business.
9 Wentworths assured Hornbacks they would wait for the final contract payment of \$10,000 until
10 Hornbacks were able to pay it. This circumstance continued for three years, the parties occasionally
11 discussing infrequently and informally the Hornbacks' financial issues. Wentworths never made oral
12 or written demand for payment of the contract balance, nor took any action to forfeit the contract.

13 12. In the summer of 1999, Hornbacks' financial circumstances improved to a level which
14 permitted them to qualify for a loan to purchase a triple-wide mobile home and complete the land
15 payment. On or about August 29, 1999, Hornbacks telephoned Wentworths to obtain a pay-off
16 figure for the land purchase. Ken Wentworth prepared a handwritten accounting (Ex. 4) showing
17 the balance of principal and interest to be \$14, 679.27, and communicated that figure to Hornbacks.
18 Hornbacks agreed to meet Wentworths the following day to pay at least the principal owing. Ken
19 Wentworth volunteered that if Hornbacks would pay the principal, "we'll forget about the interest."

20 13. On August 30, 1999, Hornbacks paid Wentworths half of the remaining principal balance,
21 \$5,000 (Ex. 2). While Wentworths expected to receive the entire \$10,000 owing, there is no
22 evidence of any protest or other conversation between the parties accompanying the \$5,000 payment.

23 14. Hornbacks continued their search for an appropriate mobile home, eventually locating a
24 suitable one. In early September, 1999, they applied for financing with Mortgage Resources of
25 Spokane (Ex. 7). On September 24, they contracted to purchase the mobile home for \$58,764 (Ex.
26 11). By the terms of the purchase contract, Hornbacks were to provide their own financing, and fund

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1 the purchase by October 30. In early October, Hornbacks were tentatively approved for financing
2 through Interwest Bank, their anticipated loan being approximately \$90,000 at 8.474% (Ex. 10). The
3 required appraisal was completed on November 5, for which Hornbacks paid \$400 (Ex. 7).

4 15. On October 21, 1999, Security Title Guaranty completed a Preliminary Commitment for
5 Title Insurance relating to Hornbacks' purchase of real estate. The commitment identified the
6 property in question as the entire Wentworth estate, that is, their residential parcel and the non-
7 contiguous 3.6 acres from which Hornbacks' lot was to be segregated. On November 5, Security
8 Title Guaranty notified Hornbacks that the transaction had been placed with that company for closing
9 by Mortgage Resources (Ex. 15). Ultimately, in December, ²⁰⁰⁰1999, Mortgage Resources cancelled the
10 order. ¶¶¶

11 16. In November, 1999, Hornbacks had leveling, excavation and septic system design work done
12 on their lot in anticipation of moving their mobile home in, paying a contractor \$890 for the work
13 (Ex. 5). On November 18, the contractor filed his septic design with the Grant County Health
14 District in support of Hornbacks' application for a sewage permit. On November 29, Hornbacks
15 completed their application for a sewage permit, paying Grant County a fee, all but \$50 of which was
16 eventually refunded (Ex. 8).

17 17. On December 7, 1999, Hornbacks applied to the Grant County Building Department for a
18 building permit, paying a fee of \$487.69 (a portion of which, \$234.99, was eventually refunded) (Ex.
19 9). Building Department staff wrote on the application that the Hornbacks' lot was to be 1.19 acres
20 segregated from a "parent" parcel of 5.82 acres. The staff advised Hornbacks that the segregation
21 could not be accomplished due to a change in Grant County subdivision ordinances.

22 18. At some time in the interim between October 31, 1995, when the parties executed their
23 written contract, and December 7, 1999, when Hornbacks applied for a building permit, Grant
24 County ordinances were amended to increase the minimum lot sizes required for segregation.
25 Previously, a minimum of 1 acre was required for both the parcel being segregated and what remained
26 of the "parent" parcel. By 1999, the minimum size for both parcels was 2.5 acres.

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1 19. Hornbacks also learned that it was necessary to remove their new triple-wide mobile home
2 from the seller's business premises by the end of December, as the business was closing. They
3 notified Wentworths in Mexico of what they had learned from the Building Department and of the
4 need to move their new home (Ex. 6). Wentworths advised they would address the segregation issue
5 when they returned from Mexico in the Spring.

6 20. Because their loan fell through due to the real estate problems, Hornbacks needed to re-
7 negotiate their purchase contract for the mobile home in order to continue to pursue their goal of
8 acquiring the home and land. The original contract was for the purchase price only, it being
9 anticipated that moving and set up costs would be funded by the bank loan. On December 17,
10 Hornbacks renegotiated with the mobile home seller, agreeing to pay \$71,459.06, at least in form (Ex.
11 12). The seller agreed to rebate to them the difference between the original selling price and the new
12 larger figure so that Hornbacks would have funds for moving and setting up the mobile home, and
13 to pay other bills.

14 21. The closure of the seller's business premises required Hornbacks to move the new mobile
15 home to a mobile home park, on Longview Street in Moses Lake, where they paid lot rent of \$185
16 a month. The rent increased in frequent increments, reaching \$295 in September, 2001. At that time,
17 the Hornbacks were able to sell their previous home, a single-wide mobile home on property they
18 owned in Cascade Valley, and move the triple-wide onto that property. The moving cost was
19 approximately \$2,500. During the interim, the single-wide was occupied by Susan Hornback's son,
20 who made the \$400 monthly payments on behalf of Hornbacks.

21 22. Upon Wentworth's return from Mexico in the Spring of 2000, they inquired of the Planning
22 Department regarding the availability of segregation of Hornbacks' lot, with the same lack of success
23 encountered by Hornback the previous December. Wentworths advised Hornbacks that they would
24 continue trying to get the conveyance accomplished, but were eventually unable to do so.

25 23. Hornbacks ultimately consulted an attorney, who requested return of their payments from
26 Wentworths, which the latter refused. This litigation ensued. Hornbacks seek rescission of the
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1 contract pursuant to chapter 58.17 RCW or, in the alternative, under common law principles.

2 ///

3 ///

4 Based upon the foregoing Findings of Fact, the Court now makes the following:

5 CONCLUSIONS OF LAW

6 1. This court has jurisdiction over the subject matter and the claims of these parties.

7 2. The parties entered into a valid and enforceable contract for the sale of adequately described
8 real property on October 31, 1995. By the terms of their contract, Hornbacks were required to pay
9 the remaining \$10,000 purchase price, together with interest at 11% per annum from the date of the
10 contract, on or before January 10, 1996. Wentworths were required, upon payment, to convey the
11 real property to Hornbacks.

12 3. The parties thereafter amended their contract, orally and by their conduct, to permit payment
13 of remaining principal and interest at a later date when the Hornbacks' financial circumstances
14 improved. Hornbacks were prepared to tender the remaining contract payment in November, 1999.

15 4. By November, 1999, performance of the Wentworths' obligation to convey became a legal
16 impossibility. If the performance of a duty is made impossible or impracticable by having to comply
17 with a governmental regulation not in existence at the time of the contract, that regulation is an event
18 the non-occurrence of which was a basic assumption on which the contract was made. Restatement
19 (Second) of Contracts § 264 (1981).

20 5. Because performance of the contract by Wentworths was legally impossible, tender of the
21 final purchase payment by Hornbacks would have been an utter futility, not required of them in order
22 to pursue rescission.

23 6. Rescission of a contract is an appropriate remedy where performance has become legally
24 impossible or impracticable. Rescission is an equitable remedy, under which the court must try, to
25 the extent possible and appropriate under the factual circumstances, to restore the parties to the
26 positions they occupied prior to entering their contract.

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1 7. Hornbacks are entitled to a judgment of rescission and to recover from Wentworths the
2 payments made by Hornbacks, to wit., \$1,000 on 10/12/95; \$9,000 on 10/31/95; and \$5,000 on
3 8/30/99, together with interest at the statutory rate, 12%, from the date of payment to the date of
4 judgment.

5 8. Because the legal impossibility arose as a consequence of the parties' *mutual* modification of
6 their contract, the remedy should not include such consequential damages as might be appropriate
7 in an action for breach of the contract. Those sums each party spent in pursuit of their legally
8 impossible contract should remain the burden of the party making the expenditure. Thus, Hornbacks
9 are not entitled to the governmental and appraisal fees they paid, the interest differential on their
10 mobile home purchase, the lot rental incurred after December, 1999, or the costs incurred for
11 preparation of the lot for occupancy. Neither are the Wentworths entitled to an offset for the cost
12 of a survey, which in actuality was incurred by them in anticipation of entering their contract, not
13 pursuant to it.

14 9. Under the equitable remedy of rescission, each couple should bear its own attorney fees and
15 costs of suit.

16 10. Chapter 58.17 RCW regulates the subdivision of real estate. It distinguishes between
17 "subdivisions," involving the division of land into five (or, at local option, up to a maximum of nine)
18 or more lots, and "short subdivisions," involving division of land into fewer lots. For the most part,
19 chapter 58.17 leaves the regulation of short subdivisions to local legislators. RCW 58.17.060.
20 Subdivisions must comply with the statute, while short subdivisions must comply with local
21 regulations. RCW 58.17.030. A purchaser of land from a seller who does not comply with such local
22 regulations may recover "damages...including any amount reasonably spent as a result of inability to
23 obtain any development permit...as well as cost of investigation, suit, and reasonable attorneys'
24 fees..." RCW 58.17.210.

25 11. If the real estate contract between the parties was a violation of the Grant County ordinances
26 adopted pursuant to chapter 58.17 RCW *at the time it was entered into*, that is, October 31, 1995,

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1 because it required a segregation which had not, as of that date, been applied for or accomplished,
2 then Hornbacks would be entitled to recover the statutory damages and costs, together with any other
3 recovery authorized by the Grant County ordinances. However, the parties ^{had at trial} have not provided to the
4 court, ^{evidence that} the provisions of Grant County subdivision ordinances as they existed in October, 1995. ^{1976 continued in effect} in

5 12. A subsequent version of the Grant County Short Plats and Short Subdivisions ordinance (Ex.
6 19), exempts from its provisions:

7 The division or segregation of unplatted land for an owner occupied residence pursuant to
8 Section V (B) (8) of the Grant County Zoning Ordinance; provided any subsequent division
9 of either of the two (2) parcels within a five (5) year period shall require a short plat or
major plat in conformance with the minimum lot size requirements in the applicable zoning
district, and this ordinance or the Grant County Platting and Subdivision Ordinance.

10 While "Section V (B) (8) of the Grant County Zoning Ordinance" was not admitted into evidence as
11 an exhibit, nor otherwise provided, the Court has obtained and reviewed that provision as it existed
12 in 1995. Section V (B) (8) provided as follows (under "USES PERMITTED" in "A
13 (AGRICULTURAL)" ZONES:

14 Any owner occupied residence which is located in the agricultural district may be segregated
15 in accordance with the Grant County Short Plat exemption once every five years, so long
16 as the segregation contains no less than one acre and the remainder of the original parcel
contains two acres or more.

17 13. There being no basis upon which the Court can determine that the 1995 contract violated
18 Grant County ordinances, Hornbacks have failed to prove the same; no further relief is therefore
19 appropriate beyond that set forth in Conclusion of Law No. 7 *supra*.

20 DONE IN OPEN COURT this 4th day of October, 2004.

21 
22 _____
23 Evan E. Sperline, Judge

APPENDIX 2

RCW 58.17.210 Building, septic tank or other development perm

RCW 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.

5817210

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 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 property to these requirements, rescind the sale or transfer and recover costs of investigation, suit, and reasonable attorneys' fees occasioned thereby.

[1974 ex.s. c 134 § 10; 1969 ex.s. c 271 § 21.]

APPENDIX 3

**AN ORDINANCE RELATING TO
SHORT PLATS AND SHORT SUBDIVISIONS**

WHEREAS, Protection of the public health, safety and general welfare requires that the division of any land into two or more lots proceed in accordance with standards to prevent the overcrowding of land; to lessen congestion of streets and highways to provide adequate space, light and air; to provide adequate facilities for water, sewage, solid waste, utilities, parks and recreation areas, sites for schools and school grounds, and other public and general uses; to provide for proper ingress and egress; and to require conveyancing by accurate legal description; and

WHEREAS, This Board had enacted an ordinance regulating the division of any land into five or more lots in the unincorporated areas of Grant County, and has been vested with authority, by Chapter 58.17 Laws of 1974, First Ex. Sess., to regulate what are referred to in the said statute as short subdivision and short plats; and

WHEREAS, This Board deems the controls, standards, and procedures set forth in this ordinance to be essential to the protection of the public health, safety and general welfare of the citizens of Grant County; and the adoption thereof to be in the public interest;

NOW THEREFORE, BE IT ORDAINED, BY THE BOARD OF COUNTY COMMISSIONERS OF GRANT COUNTY, WASHINGTON:

SECTION 1. APPLICABILITY Any division of land for the purpose of lease or sale into two or more lots but less than five lots, parcels or tracts within the unincorporated area of Grant County shall proceed in compliance with this ordinance.

SECTION 2. EXEMPTIONS The provisions of this Ordinance shall not apply to:

- (1) Any cemetery or burial plot, while used for that propose.
- (2) Any division of land in which the smallest lot created by the division equals more than 40 acres in area.
- (3) Boundary line adjustments or divisions not in a plat or short plat where access is not affected and where no new division is created thereby or where no division is reduced in size below the minimum square footage required by an applicable zoning control.
- (4) Farmstead: The subdivision which is created as a result of this exemption may not be resubdivided for five years unless it is in accordance with this ordinance or with the ordinance dealing with subdivisions of five or more lots.
- (5) Any division made by testamentary provision, the laws of descent or upon court order.
- (6) Any division made in compliance with the platting and subdivision ordinance dealing with five (5) or more lots.

- (7) The division of land into two (2) parcels; provided any subsequent division of either of the two (2) parcels within a period of five (5) years shall require a surveyed plat. This does not release a subdivider from complying with the Survey Recording Act, Chapter 50, Laws of 1973.

SECTION 3. DEFINITIONS Whenever the following words and phrases appear in this Ordinance they shall be given the meaning attributed to them by this Section. When not inconsistent with the context, words used in the present tense shall include the future; the singular shall include the plural, and the plural the singular; the word "shall" is always mandatory, and the word "may" indicates a use of discretion in making a decision.

- (1) Short Subdivision: is the division of land into four or fewer lots.
- (2) Short Plat: is a document consisting of a map of a short subdivision together with written certificates, dedications and date.
- (3) Dedication: is the deliberate appropriation of land by an owner for any general and public uses, reserving to himself no other rights than such as are compatible with the full exercise and enjoyment of the public uses to which the property has been devoted. The intention to dedicate shall be evidence by the dedication thereon; and, the acceptance by the public shall be evidenced by the approval of such plat in the manner provided in this ordinance.
- (4) Easement: is a grant by a property owner to specific persons or to the public to use land for a specific purpose or purposes.
- (5) Lot: is a fractional part of subdivided lands having fixed boundaries being of sufficient area and dimension to meet minimum zoning requirements for width and area. The term shall include tracts and parcels.
- (6) Public Road: is an improved and maintained public right-of-way which provides vehicular circulation or principal means of access to abutting properties, and which may also include provisions for public utilities, pedestrian walkways, public open spaces and recreation areas, cut and fill slopes and drainage.
- (7) Private Road: is a right-of-way for vehicular circulation not owned, improved or maintained by Grant County.
- (8) Cul-de-sac: is a road closed at one end by a circular area (with a 50 foot radius or as approved) for turning vehicles around.
- (9) Alley: is a strip dedicated to private use providing for vehicular and pedestrian access to the rear side of properties which abut and are served by a public road.
- (10) Comprehensive Plan: is the current Comprehensive Plan of Grant County adopted by the Board pursuant to state law.
- (11) Planning Commission: is the Grant County Planning Commission.

- (12) Board: is the legislative authority of Grant County.
- (13) Subdivider: is a person, including a corporate person, who undertakes to create a subdivision.
- (14) Administrator: is the Grant County Planning Director and/or Engineer, or person(s) duly authorized by said officials.
- (15) Farmstead: is that area of agricultural land devoted to but not limited to dwellings, outbuildings, corrals, gardens and orchards for personal and non-commercial use or as determined by the Administrator.
- (16) Lease: for the purpose of this ordinance, is contract between the owner and lessee giving the right to use the land for more than 10 years.

SECTION 4. PROCEDURE - ADMINISTRATOR'S DUTIES The Grant County Planning Director and/or Public Works Director referred to in this ordinance as the Administrator, is vested with the duty of administering the provisions of this ordinance and with authority to summarily approve or disapprove short plats. The Administrator may prepare and require the use of such forms as he deems essential to his duties.

SECTION 5. PROCEDURE - APPLICATION AND FEE Any person desiring to divide land situated within an unincorporated area of Grant County into two, three or four lots in which the smallest lot created by the division equals 40 acres or less for the purpose of lease or sale shall submit an application for short plat approval to the Administrator. The application shall be accompanied by a file fee of 50.00 for deposit with the County Treasurer.

SECTION 6. PROCEDURE - PLATS AND PLANS REQUIRED. A subdivider shall submit with his application for short plat approval:

- (1) Six copies of a short plat;
- (2) A sketch of proposed roads, utilities and other improvements;
- (3) A copy of the survey and field notes.

SECTION 7. ADEQUACY AND DISTRIBUTION OF PLATS AND PLANS If the Administrator determines that the proposed short plat contains sufficient elements and data to furnish a basis for its approval or disapproval, and that the sketch of proposed roads, utilities and other improvements are adequate to aid the County Public Works Director in approving or disapproving the construction of future improvements, the Administrator shall affix a file number and date of receipt to the application and promptly forward the sketch of proposed roads, utilities and other improvements to the County Public Works Director. The Administrator shall promptly forward one copy of the proposed plat each to the County Public Works Department, County Health District, P.U.D, State Highway Department, County Assessor, Department of Ecology and/or Department of Social and Health Services, telephone and gas companies, and irrigation Districts where applicable.

SECTION 8. PROCEDURE - NOTICE OF FILING Within five (5) days the Administrator shall give notice of the filing of a proposed short plat or subdivision as follows:

- (1) Through the United States Mail to:
 - (a) The legislative authority of any city or town adjacent to or within one mile of the proposed short subdivision, or the public utilities of which are contemplated for use in the proposed short subdivision.
 - (b) The State Highway Department, or its successor, of the proposed short subdivision is adjacent to the right-of-way of any state highway; and
 - (c) The Department of Ecology if the proposed short subdivision lies within a flood control zone.
- (2) By posting notices thereof at three conspicuous places on the boundaries of the proposed short subdivision.

SECTION 9. PROCEDURE - CONTENT OF NOTICE Any notice given pursuant to Section 7 shall recite.

- (1) The date of filing of the proposed short subdivision plat.
- (2) The legal description of the tract.
- (3) The name of the applicant.
- (4) The name, title and office address of the Administrator.

SECTION 10. APPROVAL - REVIEW BY AGENCIES Within fifteen days (15) following the filing of the proposed short subdivision plat:

- (1) The Grant County Health District shall notify the Administrator that water and sanitary sewage disposal methods contemplated for use in the proposed short subdivision do or do not conform to current standards.
- (2) The County Public Works Director shall notify the Administrator the proposed roads, utilities and other improvements do or do not conform to current standards; and that the survey does or does not conform to standard practices and principles of land surveying.
- (3) All other offices to which a copy of the proposed short subdivision plat has been submitted may make their needs known to the Administrator and shall be considered prior to plat approval.

SECTION 11. APPROVAL - TIME LIMITATION The Administrator shall make a decision not later than the thirteenth day following filing. The Administrator shall determine whether the proposed short subdivision and short plat satisfy the requirements of this ordinance, and whether the proposed short subdivision will apparently serve the public use and interest. From there, the Administrator shall approve or disapprove an application.

SECTION 12. APPROVAL - FILING, DEDICATION When the short plat or a short subdivision containing a dedication is approved, the applicant shall file the final short plat with the County Auditor for recording. All dedications shall be noted on the face of the short plat.

SECTION 13. DISAPPROVAL - NOTIFICATION If the Administrator disapproves the proposed short plat and/or short subdivision, he shall notify the subdivider in writing of the specific reasons for his/her disapproval.

SECTION 14. DISAPPROVAL - NOTICE OF APPEAL Within twenty (20) days following issuance of the Administrator's written notice of disapproving a short plat or a proposed short plat subdivision, the subdivider may file a notice of appeal with the Administrator. The notice shall be on a form provided by the Administrator.

SECTION 15. DISAPPROVAL - APPEAL PROCEDURE, MEETING DATE The Administrator shall immediately transmit a notice of appeal, together with a copy of the proposed short plat, copies of all reports received by the Administrator, and a copy of the Administrator's letter of disapproval to the Planning Commission. The Planning Commission shall at its regular meeting, set the date for consideration of the appeal at a public meeting.

SECTION 16. DISAPPROVAL - APPEAL MEETING, DECISION In reviewing an appeal, the Planning Commission shall consider all matters submitted by the Administrator together with such other evidence as it deems relevant, and shall either affirm or reverse the Administrator's decision, or remand the matter for further investigation by the Administrator.

SECTION 17. DISAPPROVAL - RECONSIDERATION OF APPEAL If the Administrator disapproves an application on remand from the Planning Commission, the Board shall, on the subdividers petition therefor, consider the appeal.

SECTION 18. APPROVAL - APPEAL BY OTHERS Within twenty days following the Administrator's approval of the proposed short plat and short subdivision any interested person may file notices of appeal with the Administrator; or the secretary of the Planning Commission. Only the following shall be deemed interested persons for the purpose of this section.

- (1) Any public officer or agency.
- (2) Any person who holds or owns a substantial interest in the property situated within 750 ft. of any boundary of the proposed short subdivision or short plat.

SECTION 19. APPROVAL - APPEAL PROCEDURE, MEETING DATE If an appeal is filed, the Administrator shall immediately transmit a copy of the short plat and copies of all reports received by the Administrator to the Secretary of the Planning Commission. The Auditor shall refrain from accepting a short plat containing a dedication for recording until notified by the Administrator that the matter had been finally disposed. The Planning Commission shall at its next regular meeting following filing of the appeal notice, set the date for consideration of the appeal at a public hearing.

SECTION 20. APPROVAL - APPEAL MEETING, DECISION In reviewing an appeal, the Planning Commission shall consider all matters submitted by the Administrator together with such other evidence as it deems relevant, and shall either affirm or reverse the Administrator's decision, or remand the matter for further investigation by the Administrator.

SECTION 21. APPROVAL - RECONSIDERATION OF APPEAL If the Administrator approves the application on remand from the Planning Commission, the Board shall, on the original appellant's petition therefor, consider the appeal.

SECTION 22. DEDICATIONS - REQUIRED No short plat shall be approved unless adequate provision is made in the short subdivision for such drainage ways, roads, and other general purposes as may be required to protect the public health, safety and welfare.

SECTION 23. DESIGN - CONFORMANCE TO COMPREHENSIVE PLAN AND ZONING All short subdivisions shall conform to the Grant County Comprehensive Plan and all zoning controls in effect at the time a short plat is filed for approval.

SECTION 24. DESIGN - EASEMENTS Easements shall be granted to assure that land within each short subdivision is adequately drained and that all lots can be provided with water, fire protection and utilities.

SECTION 25. DESIGN - ACCESS TO LOTS Every lot shall be provided with an adequate public or private access connecting to an existing improved public road.

SECTION 26. SURVEY STANDARDS Every subdivision of land shall be surveyed by, or under the supervision of a registered land surveyor, unless there exists an accurate amount of survey data. The preparation of preliminary and final short plats thereof shall be certified on the plat by said registered land surveyor that it is a true and correct presentation of the lands actually surveyed, where applicable. All surveys shall conform to the practices and principles for land surveying of the State of Washington.

SECTION 27. SURVEY - MONUMENTS AND MARKERS All permanent monuments within the subdivision shall be located and described as shown on the plat and all controlling corners on the boundaries of the short subdivision shall be marked with a 3/4" x 18" long galvanized iron pipe or approved equivalent driven into the ground. All monuments and markers shall be shown on the face of the plat.

SECTION 28. DEDICATIONS Land for public use may be acquired by:

- (1) Dedicating land for public use.
- (2) By reserving land for future public acquisition and development.
- (3) By conveying land or easements therein to nonprofit corporations for use by all or a limited segment of the public.

SECTION 29. DEDICATIONS - SHOWN ON THE FACE OF SHORT PLAT All dedications and reservations shall be clearly and precisely recited on the face of the plat.

SECTION 30. SHORT SUBDIVISIONS - PLAT STANDARDS Every short plat required to be recorded with the Auditor shall consist of one or more pages clearly and legibly drawn on reproducible material and shall contain a map of the short subdivision. The Plat shall be produced on an 18" x 24" sheet; the horizontal scale of which shall be 100 ft. to the inch (1" = 100') together with written data in such form that when read together, disclose the following information:

- (1) The legal description of the land.
- (2) The names, addresses and telephone numbers of all persons holding interest in the land.
- (3) The name, address, telephone number and seal of the registered land surveyor who made, or under owner whose direction was made, a survey of the subdivision.
- (4) The date of the survey.
- (5) The boundary lines of the short subdivision.
- (6) The boundaries of lots within the short subdivision.
- (7) The location of roads and existing important natural features and improvements within the short subdivision.
- (8) A layout of roads and easements.
- (9) The boundaries of all parcels dedicated or reserved for public or community uses.
- (10) Plans of proposed water distribution systems, sewage disposal systems, drainage systems, utility and irrigation easements when applicable.
- (11) A certificate bearing the typed or printed names of all persons having an interest in the divided land, signed and acknowledged by them before a Notary Public which:
 - (a) States their consent to the division of land.
 - (b) Recites a dedication by them and their successors of all claims for damages against any governmental authority.
 - (c) Grants a waiver by them and their successors of all claims for damages against any governmental authority.
- (12) The approval of the Administrator.
- (13) Total acreage within the short subdivision.
- (14) Space for signatures of Grant County Treasurer, Grant County Subdivision Administrator, Grant County Auditor.
- (15) The approval of the Irrigation District where applicable.
- (16) The approval and space for signatures for the Board of County Commissioners; Chairman, Clerk of the Board; and the County Engineer.

SECTION 31. ILLEGAL TRANSFER - MISDEMEANOR It shall be unlawful for any person, firm or corporation to transfer, sell, or lease any land in violation of the requirements of this Ordinance. Any person convicted of violating any provision of this Ordinance shall be guilty of a misdemeanor, and shall be punished by a fine of not more than \$300.00 or by imprisonment in the county jail for a period not to exceed 90 days or both, for each said violation.

SECTION 32. ILLEGAL TRANSFER INJUNCTIVE RELIEF Whenever land is divided in violation of the provisions of this Ordinance, or any person, firm or corporation transfers, sells, leases, or rents any part of such land, the Prosecuting Attorney may commence an action to enjoin further violations or attempted violations of this Ordinance by the said person, firm, corporation, or successors thereof, and to compel compliance with this Ordinance.

SECTION 33. ILLEGAL TRANSFER - ASSURANCE OF DISCONTINUANCE

The Prosecuting Attorney may accept a written assurance of discontinuance of any act or practice violative of this Ordinance from any person who has committed or is committing such act or practice to be filed with and approved by the Superior Court of Grant County. The assurance may include a promise to file a proposed short plat for approval and to satisfy all reasonable conditions required to affect its approval. Any willful failure to perform a promise contained in such an assurance shall constitute a separate misdemeanor, punishable to the same extent as other misdemeanors defined by this Ordinance.

SECTION 34. ILLEGAL TRANSFER - DAMAGE RECOVERY FOR PURCHASER

A transferee who cannot secure a building permit, septic tank permit or other developmental permit for the reason that his transferor failed to comply with any provision of this Ordinance may recover damages from his transferor, to include compensation for the loss of his bargain, actual costs of investigation and suit reasonable attorney's fees and such additional elements as the law allows.

SECTION 35. UNAPPROVED SHORT PLAT - NOT TO BE RECORDED

The Auditor shall refuse to accept for recording, any short plat which does not bear the Administrator's certificate of approval. Should a short plat be recorded without such a certificate, the Prosecuting Attorney shall apply for a writ of mandate on behalf of the Administrator, directing the Auditor to remove the unapproved plat from the Auditor's records.

SECTION 36. METES AND BOUNDS FILINGS - AUDITOR TO QUESTION

The County Auditor shall inquire of every person who tenders for recording a deed or contract for the sale of land in which appears one or more metes and bounds legal description of land, as to whether the land so described is a new division of a larger tract. In the event that it is a new division, or if the inquiry is not answered, the Auditor shall promptly notify the Administrator of the recording. Upon learning of any such recording, the Administrator shall investigate the same to determine whether a division of land in violation of this Ordinance may have occurred.

SECTION 37. NEW SEGREGATION - ASSESSOR TO NOTIFY ADMINISTRATOR

The Assessor shall promptly notify the Administrator of every new segregation of land made upon the Assessor's records. Upon learning of such segregation the Administrator shall investigate the same to determine whether a division of land in violation of this Ordinance may have occurred.

SECTION 38. RE-SUBDIVISION REQUIREMENTS

Land within a short subdivision, the short plat of which has been approved within five years immediately preceding may not be further divided until a final plat thereof has been approved and filed for record pursuant to the Ordinance dealing with subdivision of five or more lots.

SECTION 39. SEVERABILITY

If any provision of this Ordinance or its application to any person or circumstance is held invalid, the remainder of this Ordinance or the application of this provision to other persons or circumstances shall not be affected.

SECTION 40. EFFECTIVE DATE

This Ordinance shall become effective on 1st day of November 1976.

SECTION 41. REVIEW No later than on a year after the effective date of this Ordinance the Planning Commission shall review this Ordinance in public session to determine whether or not it is operating adequately, specifically, the need for survey and the minimum jurisdiction section acreage shall be reviewed.

Done this 13th day of
September, 1976.

Board of County Commissioners
Grant County, Washington

S E A L

F.D. O'DONNELL

Chairman

ATTEST:

ROBERT A. LUDOLPH

H.E. SNEAD

J.F. PEDDYCORD
COUNTY AUDITOR AND CLERK OF THE BOARD

* Amended January 23, 1979, per Irrigation District request for review.

NOTICE OF HEARING
GRANT COUNTY SHORT PLAT ORDINANCE AMENDMENT

NOTICE IS HEREBY GIVEN that the Grant County Planning Commission will consider an amendment to the Grant County Short Plat ordinance in the following section:

SECTION 30. SHORT SUBDIVISIONS - PLAT STANDARDS

(14) Space for signatures of Grant County Treasurer, Grant County Subdivision Administrator, Grant County Auditor

ADD: Public Works Director, and Board of County Commissioners

NOTICE IS FURTHER GIVEN, that the Grant County Planning Commission will, on December 1, 1993, commencing at 7:00 hold a meeting at which time a hearing on the approval of said amendment will be conducted as provided by statute, in the office of the Board of County Commissioners at the Courthouse in Ephrata, at which time any person or persons



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Court of Appeals Division III
State of Washington

Opinion Information Sheet

Docket Number: 23842-3-III
Title of Case: David L. Hornback, et ux v. Ken Wentworth, et ux
File Date: 04/20/2006

SOURCE OF APPEAL

Appeal from Superior Court of Grant County

Docket No: 01-2-00491-0
Judgment or order under review
Date filed: 01/28/2005
Judge signing: Hon. Evan E Sperline

JUDGES

Authored by Stephen M Brown
Concurring: Kenneth H. Kato
Dissenting: Dennis J. Sweeney

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DAVID L. HORNBACK and SUSAN) No. 23842-3-III
HORNBACK, husband and wife,)
)
Appellants,) Division Three
)
v.) PUBLISHED OPINION

)
 KEN WENTWORTH and DIANE)
 WENTWORTH, husband and wife,)
)
 Respondents and)
)

Cross-Appellants.

BROWN, J.--This is a real estate contract dispute between purchasers David and Susan Hornback and vendors Ken and Diane Wentworth. The purchasers failed to make contract payments and then a zoning change made contract performance illegal. The Hornbacks asked for their money back. The Wentworths refused. The Hornbacks sued for rescission. Based upon impossibility, the court equitably discharged the contract obligations by granting common-law rescission to the Hornbacks and ordered restitution of payments with statutory 12 percent interest from the date of rescission. On appeal, the Hornbacks contend the court erred in not applying statutory rescission, a remedy supporting damages and attorney fees, and in not allowing prejudgment interest from each payment date. On cross-appeal, the Wentworths contend the court erred in granting any rescission, and in not limiting interest to the lower contract rate. We hold the trial court did not abuse its equitable discretion in ordering common law rescission for intervening, supervening, legal performance impossibility and did not err in equitably adjusting the parties' gains and losses. Accordingly, we affirm.

FACTS

The facts are drawn from the trial court's unchallenged findings of fact, which are, therefore, verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

In 1986, the Wentworths acquired a 10-acre parcel of undeveloped real property in Grant County. In 1990, they sold 4 acres to a developer and approximately 1 acre to a purchaser by means of segregation. Segregation of a single lot was permissible under the then applicable Grant County subdivision ordinances. The county allowed one segregation every five years, with a minimum lot size of 1 acre, without compliance with platting procedures, as long as the newly created lot would be occupied as a residence by its owners.

On October 31, 1995, the Wentworths entered into a real estate contract with the Hornbacks, allowing the Hornbacks to purchase 1.19 acres of the Wentworths' remaining land for \$20,000. The contract provided that if the Hornbacks failed to make payments, interest would be calculated at 11 percent. If the Wentworths were forced to pay any related property expenses, these expenses would be added to the contract price, 'with interest at the rate of 11 per cent per annum until paid.' Clerk's Papers (CP) at 131. The Hornbacks paid \$10,000 up front and agreed to pay the remaining \$10,000 by January 10, 1996 in return for a statutory warranty deed.

Soon after executing the contract, the Wentworths left for Mexico, which they routinely did during the winter months. Neither the Wentworths nor the Hornbacks abided by the terms of their contract. The Hornbacks experienced financial difficulties and the Wentworths failed to segregate the Hornbacks' property, hindering them from providing a statutory warranty deed to the Hornbacks.

The parties continued in limbo until 1999, when the Hornbacks' financial state improved. On August 30, 1999, the Hornbacks paid \$5,000 of the owing \$10,000. They purchased a mobile home to place on the property. And, the Hornbacks began leveling, excavation, and septic system design work in anticipation of moving their mobile home on the property.

During the winter of 1999, the Hornbacks learned Grant County ordinances were amended regarding segregation. The minimum lot size for both the

parent parcel and the newly created parcel was 2.5 acres. Due to the delay in securing a deed to the property, the Hornbacks experienced problems with where to place their newly purchased mobile home.

Upon returning from Mexico in the spring of 2000, the Wentworths experienced the same lack of success encountered by the Hornbacks with segregating the property. The Hornbacks requested a refund of the funds they paid for the property, which the Wentworths refused. As a result, the Hornbacks filed suit, requesting rescission.

The court found the Hornbacks were entitled to the equitable remedy of rescission and were entitled to recover the \$15,000 they paid to the Wentworths plus 12 percent interest 'from the date of payment to the date of judgment.' CP at 39. The court found statutory rescission did not apply because the parties' contract was not in violation of any county ordinance at the time it was entered. Both parties unsuccessfully requested reconsideration, but the court did amend its findings to read 'the Grant County subdivision ordinance, as it existed in October 1995, was not admitted in evidence.' CP at 107. The court also changed the date interest should commence from 'the date of payment' to 'October 19, 2000,' the date the Hornbacks requested rescission. CP at 107. Both parties' appealed.

ANALYSIS

A. Rescission Remedy

The issue is whether the trial court erred by abusing its discretion in denying the Hornbacks' request for reconsideration of the court's decision to apply common-law rescission rather than statutory rescission. The Hornbacks contend if statutory rescission were applied, they would be entitled to damages and attorney fees.

We review a trial court's reconsideration decision for an abuse of discretion. *Rivers v. Wash. State Conf. of Mason Contrs.*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *Weems v. N. Franklin Sch. Dist.*, 109 Wn. App. 767, 777, 37 P.3d 354 (2002). However, whether a statute applies to a case is a matter reviewed by this court de novo. In *re Estate of Baird*, 131 Wn.2d 514, 518, 933 P.2d 1031 (1997).

Chapter 58.17 RCW covers land subdivisions. A subdivision is the division of land into five or more lots. RCW 58.17.020. RCW 58.17.210 provides, '{no} building permit . . . shall be issued for any lot . . . divided in violation of this chapter or local regulations adopted pursuant thereto.' If the seller is unable to secure a building permit, the purchaser 'may . . . rescind . . . and recover costs of investigation, suit, and reasonable attorneys' fees occasioned thereby.' RCW 58.17.210 (emphasis added). Since this case involves fewer than five lots, local regulations apply. RCW 58.17.030.

Applicable here is Section 34 of Grant County's short plat and short subdivision ordinance. Section 34 provides if a transferee cannot secure a building permit, he or she 'may recover damages from the transferor, to include compensation for the loss of his bargain, actual costs of investigation and suit{,} reasonable attorney's fees and such additional elements as the law allows.' CP at 89 (emphasis added).

Uncontested Finding of Fact 18 shows that sometime between the parties' contract date and 1999, Grant County amended its minimum lot size from 1 acre to 2.5 acres. This finding supports the trial court's conclusion that the Hornbacks could legally secure a building permit in 1995, but not in 1999. Thus, the trial court was faced with intervening, superseding, legal performance impossibility.

The facts show both parties contributed to the impossibility. The Hornbacks failed to make the final contract payment in January 1996 because of financial difficulties. The Wentworths did not initiate forfeiture proceedings. Instead, they worked with the Hornbacks during their financial difficulty and allowed tardy part payment. But, part payment on

the balance was not made until August 1999 and the zoning problem surfaced. When the Wentworths returned from their annual six-month Mexican sojourn in 2000, they attempted to segregate the Hornback lot, but failed due to the changed legal landscape. The Hornbacks filed suit requesting rescission, an equitable remedy. Thus, the trial court was faced with equitably unwinding the contract and equitably adjusting the parties' gains and losses in the rescission process; an exercise of discretion. *Willener v. Sweeting*, 107 Wn.2d 388, 397, 730 P.2d 45 (1986).

Under Section 34 of the Grant County ordinance, and RCW 58.17.210, relating to subdivisions, relief is discretionarily cast. The use of 'may' rather than 'shall' is consistent with the court's duty to seek equitable rescission. The statutory measures merely 'augment the usual panoply of measures which flow from a purchaser's common law right of rescission.' *Busch v. Nervik*, 38 Wn. App. 541, 547, 687 P.2d 872 (1984). Thus, whether in common law rescission or in statutory rescission, the court's duty remained the same, to exercise equitable discretion in the unwinding process.

The trial court, in shaping an equitable remedy, decided not to provide certain available statutory rescission remedies, like specific damages and attorney fees, reasoning when the parties contracted no county ordinance proscribed their bargain. Considering the ensuing shortcomings of both parties and the developing equities, we cannot say the court's equitable remedy selection was error. Therefore, we reject the Hornbacks' argument that specific damages and attorney fees are mandatory. Our focus remains on whether the trial court abused its equitable discretion when shaping this particular remedy based upon the given facts.

The record shows the court properly balanced the equities between the parties in adjusting their respective gains and losses while unwinding the contract during rescission. On one hand, the Hornbacks lost their lot and startup expenses because they did not make the final January 1996 payment. On the other hand, while the Wentworths lost their profit and the opportunity to complete the sale in the earlier favorable statutory scheme, they may have gained some value from the Hornbacks' startup payments. On this record, we cannot say substantial justice was not done. See *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 460, 45 P.3d 594 (2002) (equity's goal is substantial justice). Considering all, we hold the trial court did not err in exercising its equitable discretion by attempting to return the parties as much as possible to the status quo before the agreement. *Willener*, 107 Wn.2d at 397.

The Hornbacks' remaining contention that the trial court was required to grant prejudgment interest from the date of each payment rather than the date of rescission request is equally a matter of equity. While the court had discretion to start interest from the respective payment dates, its exercise of discretion was designed to adjust the respective gains and losses. Even if it were an enforceable legal right, equity may prevent enforcement to do substantial justice. *Mendez*, 111 Wn. App. at 460. In any event, the Hornbacks' payments belonged to the Wentworths until rescission was sought and were not in that sense wrongfully withheld. A trial court's award of prejudgment interest is reviewed for an abuse of discretion. *Curtis v. Security Bank*, 69 Wn. App. 12, 20, 847 P.2d 507 (1993). Considering our record, we conclude no abuse of discretion occurred.

B. Cross-Appeal

First, the Wentworths contend no rescission is merited. However, as discussed, the intervening supervening legal impossibility properly supports the equitable remedy of rescission. Still, the Wentworths argue the Hornbacks waived rescission by their conduct. Second, they argue the Hornbacks failed to tender full payment. Third, the Wentworths argue no additional consideration supports a contract modification. Lastly, the Wentworths argue the Hornbacks' claim is barred by the statute of

limitations.

Our standard of review is whether the trial court abused its discretion in rescinding the contract. *Willener*, 107 Wn.2d at 397. 'Rescission is an equitable remedy and requires the court to fashion an equitable solution.' *Id.* (citing *Nervik*, 38 Wn. App. at 547). The parties should be restored to the 'positions they would have occupied if no contract had ever been made.' *Id.* The court's equitable powers include the power to prevent the enforcement of a legal right to prevent an inequity under the circumstances. *Mendez*, 111 Wn. App. at 460. Equity's goal is to do substantial justice. *Id.*

The Wentworths first three arguments lack merit because courts sitting in equity exercise broad discretion shaping relief. *Hough v. Stockbridge*, 150 Wn.2d 234, 236, 76 P.3d 216 (2003). Waiver, partial consideration and modification issues do not override the intervening, superseding, legal performance impossibility in Grant County. Void or illegal real estate contracts create a common law right to rescission. *Gilmore v. Hershaw*, 83 Wn.2d 701, 704, 521 P.2d 934 (1974).

Relying on *Browning v. Howerton*, 92 Wn. App. 644, 966 P.2d 367 (1998), the Wentworths argue the parties' contract lacked material terms covering the Wentworths' obligation to segregate the land and parol evidence would show evidence triggering the three-year statute of limitations under RCW 4.16.080(3). But we are not dealing with missing material contract terms in our uncontested facts. Thus, *Browning* does not aid the Wentworths. Notably, *Browning* in dicta recognized rescission based upon mutual mistake is still an action upon a written contract subject to the six-year limitation period of RCW 4.16.040. *Id.* at 649-50. And, the Hornbacks brought their suit within three years of discovering the impossibility in any event.

Second, the Wentworths alternatively contend that even if rescission was merited, prejudgment interest should have been limited to the 11 percent contract rate.

While the parties' contract sets an 11 percent interest rate, this rate related to (1) the rate the Hornbacks would pay if payments were deferred, and (2) the rate the Hornbacks would pay on property expenses, such as taxes and insurance, paid by the Wentworths if the Hornbacks failed to pay the expenses. The contract interest rate was not set to provide for equitable restitution upon rescission. Considering all, we cannot say the court erred in equitably setting the prejudgment interest rate at 12 percent.

C. Attorney Fees

The Hornbacks request for attorney fees under RCW 58.17.210 is denied. They have not prevailed. The Wentworths initially requested attorney fees under RCW 4.84.250 but acknowledged in their reply brief that this section was inapplicable and withdrew their request.

Affirmed.

Brown, J.

I CONCUR:

Kato, J.

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Court of Appeals Division III
State of Washington

Opinion Information Sheet

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JUDGES

Authored by Stephen M Brown
Concurring: Kenneth H. Kato
Dissenting: Dennis J. Sweeney

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No. 23842-3-III

SWEENEY, C.J. (dissenting)--The question before the court is whether David and Susan Hornback are entitled to the benefit of RCW 58.17.210. That statute, like the common law doctrine of equitable rescission, permits them to rescind this contract, but in addition provides for reasonable attorney fees. Whether this statute applies is a question of law we should

review de novo. In re Estate of Baird, 131 Wn.2d 514, 517-18, 933 P.2d 1031 (1997). The question before us is not whether the trial judge abused his discretion. The question is whether this statute applies.

The trial judge concluded that the statutory rescission did not apply because the contract was not in violation of any county ordinance 'at the time it was entered into.' Clerk's Papers (CP) at 39. This is error. Neither RCW 58.17.210 nor the Grant County ordinance referenced in the majority opinion limits the remedies available under this statute to sales where a building permit could not have been secured 'at the time {the contract} was entered into,' as the court concluded. CP at 39 (emphasis omitted).

A purchaser, who cannot secure a building permit, may rescind 'and recover costs of investigation, suit, and reasonable attorneys' fees occasioned thereby.' RCW 58.17.210. Both the legislature and Grant County provide for recovery costs and fees in addition to the remedy of rescission. The trial court erred in denying the Hornbacks this remedy. I would reverse and remand with instructions to award costs and attorney fees.

Sweeney, C.J.

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