

69105-8

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No. 69105-8-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

ROBERT MATICHUK, Appellant,

v.

WHATCOM COUNTY, et al, Respondents.

BRIEF OF RESPONDENT

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COURT OF APPEALS
STATE OF WASHINGTON
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A. INTRODUCTION

Plaintiff Matichuk alleges that a downzone of his property is a taking. More specifically, he seeks compensation for a down-zone and lot consolidation that occurred under Whatcom County Ordinance 2008-003.

Prior to the passage of this Ordinance, Matichuk owned eight lots upon which he could have built seven homes. When the ordinance changed the zoning, his eight lots became five. Matichuk constructed five homes on the five resulting lots and sold them.

He subsequently filed this suit, alleging that a regulatory “taking” had rendered two of his seven buildable lots valueless. The Superior Court granted the County’s motion for summary judgment, finding that no taking occurred.

B. ASSIGNMENTS OF ERROR

1. Respondent’s Assignments of Error.

None. The trial court properly granted summary judgment.

2. Appellant’s Assignments of Error

(a) “The trial court erred in granting summary judgment of dismissal to Whatcom County after concluding that no regulatory taking occurred under the [F]ifth [A]mendment to the U.S. Constitution.”

(b) The trial court erred in granting summary judgment of dismissal to Whatcom County after concluding that no regulatory taking occurred under [A]rticle I, section 16 of the Washington Constitution.”

3. Appellant's Issues pertaining to Assignment of Error.

- (a) "Did the trial court err in concluding that the properties at issue still retained value despite the fact that they were no longer buildable, such that no regulatory taking occurred?"
- (b) "Did the trial court err in concluding that plaintiff was no longer the real party in interest when plaintiff subsequently transferred the unbuildable lot to the adjacent owner with a reversionary interest?"

C. FACTUAL STATEMENT OF THE CASE

There are no disputed facts in this case, and therefore it is ripe for summary judgment. Respondent generally accepts the facts as alleged in the Appellant's Opening Brief and restates them as follows:

Lots 19-24.

In July, 2005, Matichuk purchased lots 19 through 24 (6 lots total) in Block 3 of South Geneva in Whatcom County, Washington; at the time of this purchase zoning allowed for five (5) homes to be built on the six lots. CP 12-13. In 2006 Matichuk built 2 homes; one home on lot 19 and one home on lot 20, and then in 2007 Matichuk built homes on lots 21 and 22, for a total of four homes. CP 13. On February 13, 2008 Whatcom County enacted Ordinance No. 2008-003, which amended the Whatcom County Comprehensive Plan Map and also increased the minimum buildable lot size to 5 acres. CP 13. None of these six lots was 5 acres. CP

13. Under operation of a longstanding Whatcom County Ordinance, lots that are adjacent to one another and in single ownership are consolidated into one lot if they do not conform to minimum parcel size requirements. Whatcom County Code 20.83.070. Through this Ordinance, lots 23 and 24 were consolidated with lot 22 to form one larger lot. CP 125.

On May 27, 2008 Matichuk applied for a building permit to construct the 5th single family residence that he believed was allowed on Lots 23 and 24. CP 14. However, since the zoning had changed and the lots were consolidated Whatcom County denied Matichuk's application to construct this 5th home. CP 14. Matichuk appealed the lot consolidation. CP 14. He went before the Hearing Examiner who denied his appeal in a decision dated July 14, 2010. CP 125. Prior to appealing, Matichuk unsuccessfully attempted to have the rezone lifted from his property. CP 15. In an agreement dated August 28, 2008, Matichuk sold the home on lot 22 along with lots 23 and 24 to buyers Marty M. & Robin M. Bull (Bull). CP 43. This was not a forced sale; the agreement shows that he received good and valuable consideration for that sale. CP 45. Part of the provisions of that sale included what would be considered a "claw back" provision stating that if his appeal of the lot consolidation was successful then he would get lots 23 and 24 back. CP 44. However, since he was unsuccessful in his appeal, he did not in fact receive those lots back and

the Bulls own them. *See Id.* Consequently, the sale is final and he has no interest in the property. *See Id.* Matichuk filed this lawsuit on July 7, 2011. CP 61. Thus, Matichuk had no interest in lots 22-24 at the time of filing. *See CP 44.*

Lots 17 and 18.

Matichuk purchased lots 17 and 18 on May 31, 2007, in a single purchase. CP 12. At the time of purchase each lot was zoned urban residential UR 3, which would have allowed one home on each lot. CP 13. On June 3, 2008, Matichuk applied for separate building permits to construct single family residences on each of lots 17 and 18. CP 14. Again, under Ordinance 2008-003, neither of the lots constituted 5 acres and they were consolidated into one lot; therefore he was allowed to construct one residence. CP 25. He constructed one residence on the consolidated lots, and, on May 14, 2009, sold them together for good and valuable consideration. CP 140. Thus, at the time of filing this lawsuit on the 7th of July, 2011, Matichuk had no interest in lots 17-18. CP 61, CP 43, CP 140.

D. ARGUMENT

1. Standard of review.

The standard of review for summary judgment for this court is *de novo*, as set forth in Ranger Ins. Co. v. Pierce Cnty., 164 Wash. 2d 545, 192 P.3d 886, 889 (2008):

We review summary judgments *de novo*. City of Sequim v. Malkasian, 157 Wash.2d 251, 261, 138 P.3d 943 (2006). “Summary judgment is appropriate when ‘there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.’ ” Locke v. City of Seattle, 162 Wash.2d 474, 483, 172 P.3d 705 (2007) (alteration in original) (quoting CR 56(c)). When determining whether an issue of material fact exists, the court must construe all facts and inferences in favor of the nonmoving party, Ranger Insurance. See Reid v. Pierce County, 136 Wash.2d 195, 201, 961 P.2d 333 (1998). A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. Wilson v. Steinbach, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982); Barrie v. Hosts of Am., Inc., 94 Wash.2d 640, 618 P.2d 96 (1980).

567 ¶ 13 Summary judgment is subject to a burden-shifting scheme. The moving party is entitled to summary judgment if it submits affidavits establishing it is entitled to judgment as a matter of law. See Meyer v. Univ. of Wash., 105 Wash.2d 847, 719 P.2d 98 (1986). The nonmoving party avoids summary judgment when it “set[s] forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact.” *Id.* at 852, 719 P.2d 98. To this end the nonmoving party “may not rely on speculation, [or] argumentative assertions that unresolved factual issues remain.” Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wash.2d 1, 13, 721 P.2d 1 (1986).

Ranger Ins. Co. at 552.

Thus, the County must establish that it is entitled to summary judgment as a matter of law. The burden then shifts to Matichuk to set forth specific facts which rebut the County's contentions and show a genuine issue of material fact. Matichuk may not rely on speculation or assertions to establish an issue and defeat summary judgment. *Id.*

2. Matichuk did not vest to zoning until he submitted building permit applications per RCW 19.27.095(1).

Even if all of the facts are as Matichuk claims, he did not vest to the zoning for all seven buildable lots, and he is not entitled to compensation for a rezone of those to which he did not vest.

Matichuk admits that he had no completed building applications pending with the County for the consolidated lots at issue here prior to the adoption of the new Ordinance. Matichuk, however, takes the position that the zoning could not change once he informally told staff how he anticipated developing his properties. This simply is not correct under RCW 19.27.095(1), which requires a landowner to submit a formal building application to vest zoning rights:

- (1) A valid and fully complete building permit application for a structure, that is permitted under the zoning or other land use control ordinances in effect on the date of the application shall be considered under the building permit ordinance in effect at the time of application, and the zoning or other land use control ordinances in effect on the date of application.

Consistent with the statute, the County's position is that, until a completed building permit application is filed, zoning can change, as it did in this case.

When Mr. Matichuk first spoke with the County, zoning was in effect which *would have* allowed him to build seven (7) houses on eight (8) lots. Thus, the initial statements made by County staff indicating he could build seven (7) houses were consistent with the zoning at the time. Matichuk applied for only four (4) building permits prior to the zoning and consolidation Ordinance. Those four (4) building permit applications were reviewed per the regulations and zoning in effect on the date of those completed applications, and the County permitted the four (4) homes. This was consistent with the vested rights doctrine in the state of Washington—that developers have the right to develop land under the regulations and zoning in effect on the date of a complete building application regardless of subsequent changes in zoning or other land use regulations.¹

Matichuk could have developed all seven (7) homes if he had filed completed building permit applications for those seven (7) homes prior to the zoning and consolidation Ordinance. But he only applied for four (4) homes. There was no vesting for the other three (3) lots, and they were,

¹ See Erickson and Associates, Inc., vs. McLerran, 123 Wn.2d 864, 867-68, 872 P.2d 1090 (1994).

thus, subject to the new zoning Ordinance.² After the Ordinance was passed, he was allowed to build one (1) more home instead of three (3).

Matichuk makes the argument on page 9 of his brief that “Plaintiff started his development project not with five lots, but with seven.” This argument—that vesting occurs on the date he feels he “started” his development project—is inaccurate.³ Vesting occurs upon application.

Without applications, Matichuk’s undeveloped properties were subject to the new zoning. To rule otherwise is to rule that he was vested to zoning for undeveloped lots without filing applications, which is contrary to the bright-line rule of RCW 19.27.095(1).⁴ That is an extension that has never been recognized.

Matichuk did not lose the right to develop a certain number of lots, because he never vested to that right. Instead, he owned land subject to zoning changes. As such Matichuk’s case must be dismissed.

² Matichuk has not attacked the validity of the underlying zoning.

³ Matichuk does not provide a specific date that he “started” his development. Possibilities include: the dates of purchase, or the dates he informally told County staff his plans. However, Matichuk does not actually allege that either of these provides a vesting date.

⁴ Ownership of undeveloped land is land speculation. The rule that a landowner vests to development regulations and zoning upon submission of a development application provides a bright-line that affords predictability in land development. Applications, in turn, trigger time limits, putting the development “on the clock” to ensure completion within a reasonable time frame so that development does not linger and remain subject to outdated, or even antiquated, regulations.

3. Consolidation of three lots did not eliminate all economic use of the property.

Matichuk claims that he “lost all economic benefit to [two of his lots] because they could not be built upon.” Matichuk’s brief at 11. However, Matichuk has not provided prima facie facts to support this claim.

We start with the tenet that regulations that reduce value are not takings in most circumstances. As Justice Holmes wrote in the case of Pennsylvania Coal vs. Mahan, 260 U.S. 158, 43 S.Ct. 158, 67 L.Ed.2d 322 (1922):

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, and most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.

The Courts have established two instances in which a regulation can be a taking that requires compensation. The first is where there is a

*physical invasion of the property, and the second is where the regulation deprives the owner of all economical use of the land.*⁵

(1) Not a physical invasion.

Matichuk does not allege physical invasion.

(2) The facts do not establish zero economical use of the land.

To prove that a statute creates a taking via regulation on its face under this prong, Matichuk must show that the regulation denies him all economically viable use of the property.⁶

Matichuk argues that he lost *all* of the value of two “buildable lots” when three lots were consolidated by Ordinance—lot 18 was consolidated with 17, and lots 23 and 24 were consolidated with 22.^{7 8}

Matichuk did not lose possession of the lands at issue; they were consolidated with his other lots, making those bigger. Matichuk does not provide appraisals (or other facts) comparing the value of the land prior to the Ordinance and the value of the land post-Ordinance to establish a reduction in value. RP 3.

Further, Matichuk sold the land for good and valuable consideration. Indeed, Matichuk built on consolidated lots 17 and 18 and

⁵ See Lucas vs. South Carolina Coastal Council, 112 S.Ct. 2886 at 2893 (June 1992).

⁶ See Peste vs. Mason County, 133 Wn.App. 456, at 472, 136 P.2d 140 (June 2006).

⁷ Plaintiff's brief, page 10.

⁸ What Matichuk actually owned was subdivided land that would *become* buildable when he obtained a permit. Owning undeveloped land with the potential to become more valuable with future development is standard land speculation.

sold the resulting double lot with a home on it. RP 3. Lots 23 and 24 were sold with lot 22 as a single triple-size lot with a home on it. The *Agreement as to Conveyance of Real Property* with buyer Bull concerning lots 23 and 24⁹ recites that “good and valuable consideration” was given specifically for lots 23 and 24. A sale is evidence of some value. And a purchase is perhaps the best evidence of some value. The land certainly did not sit fallow and unwanted.

Matichuk also complains that the consolidated lots “could not under any circumstances be developed.” *Id.* What he likely means is that they could not be developed *with an additional single family dwelling*. However, Matichuk presents no evidence that the land could not be developed with a garage, an accessory dwelling unit, a playset, a lawn, or any other improvement besides a single family residence that might make the land a valuable addition to the lot with which it was consolidated. The burden of providing such evidence is on Matichuk, and there is none in the record.

Note that lots 17 and 18 together did not meet the five (5) acre minimum, yet the County allowed Matichuk to construct a house on the consolidated lots post-Ordinance anyway, affording them substantial

⁹ This conveyance incorporates by reference the purchase and sale of lot 22 at provision 1 on page 3 of the agreement. CP 131.

collective value. There has been no evidence presented by Matichuk that lot 18 added zero value to the home site lot 17 when it doubled the lot's size. Indeed, that doesn't make sense.

Matichuk must set forth specific facts to establish the element of zero value. "[A]rgumentative assertions" are not enough.¹⁰ There are not facts present to establish zero value. In fact, the evidence in the record shows some value.

4. Matichuk does not have standing to sue for a taking because he does not own the property.

The undisputed facts show that prior to filing this lawsuit, Matichuk divested himself of all interest in these properties. He built a home on lot 22 and sold it with lots 23 and 24 to buyer Bull prior to this suit. The purchase and sale documents show that he received good and valuable consideration for the sale of that consolidated lot.¹¹ He also constructed a home on consolidated lots 17 and 18 and sold them on May 14, 2009 for good and valuable consideration.¹² Thus, he had no present or future interest in any of these properties at the time he filed this complaint.

The doctrine of standing requires that a plaintiff must show a personal stake in the outcome of the case in order to bring suit. The Supreme Court once described this requirement as 'one seeking relief must show a clear legal or equitable

¹⁰ Pennsylvania Coal, supra.

¹¹ CP 132.

¹² CP 140.

right and a well grounded fear of immediate invasion of that right.¹³

Once Matichuk sold the properties he no longer had an interest in them. Indeed, he collected money for, and disposed of the property he now claims Whatcom County has taken. Matichuk does not have the property. Whatcom County does not have the property. The parties who *do* have the property are not party to this suit. Thus, this court has no jurisdiction over the property itself. This court cannot order Whatcom County to give the property back. This court cannot order Whatcom County to take possession of the property and pay Matichuk's claimed historic value, as might happen in an eminent domain case. In short, Matichuk cannot have it both ways; he cannot both sell his property and claim the County took it.

Matichuk lacks standing to bring this action and it should be dismissed.

E. CONCLUSION

Matichuk has no continuing interest in these properties and therefore lacks standing to bring this action. Matichuk did not vest his right to develop. Whatcom County did not deprive Matichuk of all economic value of his land. In fact Matichuk constructed homes on the

¹³ DeFunis vs. Odegaard, 82 Wn.2d 11, 24, 507 P.2d 1169. *See also* Gustafson vs. Gustafson, 47 Wn.App. 272, at 276 (Mar 1987).

land and sold them. Matichuk has not come forward with evidence establishing zero value. No regulatory taking has occurred.

Therefore, the summary judgments granted in this case was warranted and should be affirmed.

RESPECTFULLY submitted this 25th day of July, 2013.



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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached, to Bryan D. Lane, counsel of record for Appellant, addressed as follows:

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