68739-5

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Case No. 68739-5-I

IN THECOURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION ONE

In the Matter of

KHUSHDEV MANGAT and HARBHAJEN MANGAT,

Appellants

vs.

SNOHOMISH COUNTY, LUIGI GALLO, JOHANNES DANKERS and MARTHA DANKERS,

Respondents

BRIEF OF RESPONDENTS LUIGI GALLO, JOHANNES DANKERS and MARTHA DANKERS

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Respondents Luigi Gallo, Johannes Dankers and Martha Dankers submit this brief in response to the opening brief of the appellants.

I STATEMENT OF ISSUES

The issues affecting the rights and interest of respondents Dankers and Gallo in this appeal are:

1. Do the appellants have standing under LUPA to challenge the preliminary approval of the subdivision of the Dankers and Gallo properties?

2. Is appellants' action for a writ of prohibition precluded by LUPA?

3. Are the appellants' actions for a LUPA appeal, writ of prohibition and writ of mandamus barred under the doctrine of res judicata and/or the doctrine of collateral estoppel?

4. If they prevail on appeal, are respondents, Dankers and Gallo, entitled to an award of reasonable attorney fees and costs under RCW 4.84.370?

II. STATEMENT OF THE CASE

1. This appeal involves the third lawsuit the appellants, Khushdev Mangat and Harbhajen Mangat ("Mangats"), have filed against respondents, Johannes and Martha Dankers ("Dankers") and Luigi Gallo ("Gallo"), each of which arises out of the Mangats failed attempt to purchase and develop the property owned by Dankers and Gallo.

2. The Dankers own a 31.85-acre tract of undeveloped land which abuts a 40-acre tract owned by Gallo. CP 47. In March, 2007, the Mangats entered separate purchase and sale agreements with the Dankers and Mr. Gallo, which contained identical terms. CP 48. Both agreements contained an addendum which required that the Mangats prepare and submit a complete application for the subdivision of the properties after completion of the 60-day feasibility study and that they diligently pursue approval of the subdivision. CP 48-49, 66. The addendum further provided that the Mangats would turn over to the Dankers and Gallo all maps, plans, drawings, studies, reports and other written documents related to the subdivision of property in the event the Mangats defaulted under the purchase and sale agreement. CP 49,66. The intent and agreement among the parties was that the Dankers and Gallo would proceed with obtaining approval of the subdivision of their properties in the event of the Mangats' default. CP 48. The agreement allowed the Mangats up to 14 months to close the purchase. The Dankers would not

have allowed the Mangats to tie up their property for 14 months at a fixed price unless there was a commitment to begin the subdivision process and to turn over their work product if they defaulted. CP 49.

3. Through a series of amendments, the closing date for the Mangats' purchase of the properties was extended to December 16, 2009. CP 49. However, in September, 2009, the Mangats lender declined their request for a development loan to finance the cost of acquisition of the property and subdivision improvements. CP 49-50. The Mangats ceased processing the subdivision application and did not pay consultants working on that subdivision. CP 50. They could not and did not close the purchase of the property in December 16, 2009. CP 50. The Dankers and Mr. Gallo then declared them in default and took over the processing of the subdivision application. CP 50.

4. The Dankers and Mr. Gallo hired land use consultant, Ry McDuffy, and his firm known as Land Resolutions to assist them in processing the subdivision application. CP 50. Mr. McDuffy reviewed the file and determined that the Mangat's proposed plat for the property was deficient in several ways and that there were outstanding issues and problems identified by County staff which needed to be addressed. Mr. McDuffy summoned a new team of engineers and surveyors who redesigned the plat layout, submitted a revised plat map and responded to outstanding requests for information and issues identified by the County's

planning staff. CP 77-78. Over the next 14 months, the property owners and Mr. McDuffy expended considerable time, effort and money to perfect the plat application. CP 50.

5. In July, 2010, the Mangats filed suit against Dankers and Gallo under Snohomish County Cause No. 10-2-07649-1 seeking money damages against them on the theory that they were unjustly enriched by the work Mangats' consultants had done on their subdivision application. CP 51, 69-73.

6. The County's planning staff completed a staff report recommending approval of the subdivision application as supplemented by Mr. McDuffy's team of consultants. A hearing on preliminary approval of the plat was set for April 12, 2011. CP 79, 93, 94-103.

7. Through their attorney, Scott Stafne, the Mangats requested that the hearing examiner stay the April 12 hearing on the grounds that the Mangats claimed to "own" the application. CP 79. The hearing examiner issued an order calling for additional information from the parties of record to address the request of the Mangat's to stay the proceeding. CP 105. She received submittals from Mr. Stafne and the Mangat's land use consultant, Gene Miller, as well as from counsel for the Dankers and Ed Caine on behalf of the Department of Planning and Development Services. CP 79. The hearing examiner considered the submittals and entered her

order denying the plaintiffs' motion for a stay by her order dated April 5, 2011. CP 108-109.

8. On March 22, 2011, the Mangats commenced an action against Dankers, Gallo and Snohomish County alleging that they "owned" the subdivision application for the Dankers and Gallo properties and that Snohomish County unlawfully was "taking" this property interest from them. In this action under Snohomish Superior Court Cause No. 11-2-03863-5, they sought to enjoin the further processing of the subdivision application and, in the alternative, for damages from Snohomish County for a taking of their property without compensation. CP 288-294.

9. Without any notice to defense counsel, Mangat's counsel, James Watt, appeared on April 8 before the Court Commissioner of Snohomish Superior Court with a motion for a temporary restraining order and convinced the Court Commissioner to enter that temporary restraining order.

10. With notice to Mangat's counsel, attorneys for Dankers and Gallo, brought a motion to quash the temporary restraining order. An associate from the Law Office of Scott Stafne appeared, but did not oppose the motion to quash the TRO and an agreed order was entered on April 11, quashing the TRO. Unfortunately, prior to receiving the order quashing the TRO, the hearing examiner canceled the April 12 hearing because she had received a copy of the TRO. Upon learning of the order

quashing the temporary restraining order, the hearing examiner determined that the hearing on the preliminary approval of the subdivision should be reset for May 11, 2011. CP 80.

11. On May 3, 2011, the Mangat's motion for a preliminary injunction staying proceedings on the plat application came on for hearing before Court of Appeals Judge Robert Leach, serving as judge pro tem of the Snohomish County Superior Court. Judge Leach entered an oral decision making certain findings and denying the motion for preliminary injunction and directed that the parties submit written findings and an order for his execution. On May 16, 2011 Judge Leach entered his written decision denying the Mangat's motion for preliminary injunction. CP 296-300.

12. On May 11, 2011, the hearing examiner, Millie Judge, held a hearing on the application for the subdivision of the Dankers' and Gallo property. On May 17, 2011, she entered a decision granting approval of the plat application with conditions. CP 201-217.

13. The Mangats appealed the hearing examiner's decision to the Snohomish County Council. CP 530-545. Mr. and Mrs. Dankers and Mr. Gallo moved for summary dismissal of the appeal pursuant to S.C.C. 30.72.075.

14. On June 15, 2011, the Snohomish County Council summarily dismissed the appeal. CP 506-508.

15. On July 5, 2011, the Mangats filed a petition in Snohomish County Superior Court for review of the decisions by the Snohomish County Council and hearing examiner, pursuant to the Land Use Petition Act, under Snohomish County Superior Court Cause No. 11-2-06519-5 and included in their pleadings claims for writ of mandamus, writ of prohibition and damages against Snohomish County under Chapter 64.40 RCW. CP 486-549.

16. On July 12, 2011, the Mangats voluntarily dismissed their lawsuit against Dankers and Gallo for unjust enrichment.

17. In July, 2011, Snohomish County and Dankers and Gallo filed motions for summary judgment for dismissal of the Mangats action under Snohomish Superior Court Cause No. 11-2-03863-50. Mangats filed cross motions for summary judgment. At a hearing on August 17, 2011, Judge Kurtz granted the motions of Dankers, Gallo and the County, denied Mangats' motion and entered summary judgment dismissing the action. CP 302-306. The Mangats appealed the summary judgment dismissing their action and that appeal is pending in this Court of Appeals under Cause No. 67712-8-I.

18. On September 13, 2011, Snohomish County moved for partial summary judgment for dismissal of Mangats' LUPA petition and claims for writ of mandamus and writ of prohibition. Dankers and Gallo joined in the motion. On October 19, 2011, Judge Farris granted the motion and

dismissed all claims in the action, except for the Mangats claims against the County under RCW 64.40. CP 5-7 & 13-15.

19. At a hearing on April 10, 2012, Judge Bowen dismissed the remaining claims and Mangats filed this appeal. CP 8-9.

III. ARGUMENT

1. The Appellants Lack Standing Under LUPA To Challenge The Preliminary Approval Of The Subdivision Of Dankers' And Gallo Properties.

When the Washington State Legislature adopted the Land Use Petition Act ("LUPA") in 1995, it established a new and exclusive procedure for judicial review of land use decisions. Its legislative intent is well stated in RCW 36.70C.010:

> The purpose of this chapter is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.

The Legislature expressly provided that LUPA is the only means of judicial review of land use decisions in RCW 36.70C.030, which states:

> (1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:
>
> (a) Judicial review of:

> (i) Land use decisions made by bodies that are not part of a local jurisdiction;
>
> (ii) Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board or the growth management hearings board;
>
> (b) Judicial review of applications for a writ of mandamus or prohibition; or
>
> (c) Claims provided by any law for monetary damages or compensation. If one or more claims for damages or compensation are set forth in the same complaint with a land use petition brought under this chapter, the claims are not subject to the procedures and standards, including deadlines, provided in this chapter for review of the petition. The judge who hears the land use petition may, if appropriate, preside at a trial for damages or compensation.
>
> (2) The superior court civil rules govern procedural matters under this chapter to the extent that the rules are consistent with this chapter.

The Legislature also established strict and specific requirements for standing to appeal a land use decision under LUPA. Those standing requirements are set forth in RCW 36.70C.060 which provides:

> Standing to bring a land use petition under this chapter is limited to the following persons:
>
> (1) The applicant and the owner of property to which the land use decision is directed;
>
> (2) Another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within

> the meaning of this section only when all of the following conditions are present:
>
> (a) The land use decision has prejudiced or is likely to prejudice that person;
>
> (b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;
>
> (c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and
>
> (d) The petitioner has exhausted his or her administrative remedies to the extent required by law.

It is undisputed that the appellants were not owners of the subject property, and were not the applicants in the proceedings before the hearing examiner. Their LUPA petition concedes that they cannot claim standing under RCW 36.70C.060(1), but claims standing under RCW 36.70C.060(2). (CP 489, LUPA Petition, Paragraph 3.3 at page 4 stating: "The Mangats have standing to seek judicial review pursuant to RCW 36.70C.060(2)." However, Mangats have failed to meet two of the essential requirements to qualify as an "Another person aggrieved or adversely affected by the land use decision" under RCW 36.70C.060(2)".

a. No Injury In Fact. First, the appellants have failed to show injury to themselves or their property arising out of the preliminary approval of the subdivision of the property owned by the Dankers and Mr. Gallo. The courts have uniformly stated that the condition under RCW

36.70C.060(2)(a) that the land use decision has prejudiced or is likely to prejudice the petitioner requires a showing of injury in fact.

In Chelan County v. Nykriem, 146 Wn. 2 904, 52 P.3d 1 (2002), the Washington State Supreme Court held that Chelan County had standing under LUPA, but that the neighboring property owners had failed to establish their standing to be intervenors in the action because of their lack of a showing of any injury. In discussing the requirements for standing under LUPA, the Court stated:

> "In general, parties owning property adjacent to a proposed project and who allege that the project will injure their property have standing." [A] party need not show a particular level of injury in order to establish standing" to bring an action under LUPA. As neighbors of Respondents alleging injury to their property because of the BLA and proposed development, Intervenors in this case might satisfy the prejudice requirement.
>
> Contrary case law directly discussing standing under LUPA, however, suggests that Intervenors do not have standing. An interest sufficient to support standing to sue, however, must be more than simply the abstract interest of the general public in having others comply with the law. Intervenors maintain that their "sole interest in this matter is to preserve the protections of the zoning in the district in which they are located." Without alleging more specific injuries adversely affecting them or their property, Intervenors in this case have not established that they are prejudiced within the meaning of an "aggrieved person" under LUPA. ***Id. at 934-35***.

Similarly, in Thornton Creek Legal Defense Fund v. City of Seattle, 113 Wn. App. 34, 52 P.3d 522, review denied 149 W.2d 1013

(2002), the Court of Appeals defined the requirement for a showing of prejudice as follows:

> To establish standing under LUPA, Thornton and CFLN must demonstrate they are "aggrieved or adversely affected by the land use decision." [fn omitted] A person is not "aggrieved or adversely affected" under LUPA unless "[t]he land use decision has prejudiced or is likely to prejudice [them]." [fn omitted] To satisfy this requirement, Thornton and CFLN must allege facts showing that they would suffer an "injury-in-fact' as a result of the land use decision. [fn omitted] In other words, Thornton and CFLN must show they personally "will be 'specifically and perceptibly harmed' by the proposed action." [fn omitted] ***Id. at 47-48***.

In its most recent decision addressing the standing issue under LUPA, Knight v. City of Yelm, 173 Wash .2d 325, 267 P.3d 973 (2011), the Supreme Court cited Nykriem with favor and clearly stated the injury in fact requirement under RCW 36.70C.060(2)(a):

> To satisfy LUPA's prejudice requirement, a petitioner must show that he or she would suffer an "injury-in-fact" as a result of the land use decision. *Nykriem*, 146 Wash.2d at 934, 52 P.3d 1. "To show an injury in fact, the plaintiff must allege specific and perceptible harm. If the plaintiff alleges a threatened rather than an existing injury, he or she 'must also show that the injury will be immediate, concrete and specific; a conjectural or hypothetical injury will not confer standing.' " *Suquamish Indian Tribe v. Kitsap County*, 92 Wash.App. 816, 829, 965 P.2d 636 (1998) footnote omitted (internal quotation marks omitted) (quoting *Harris v. Pierce County*, 84 Wash.App. 222, 231, 928 P.2d 1111 (1996)). ***Id. at 341***.

The appellants do not own any property in the vicinity of the proposed subdivision of the Dankers and Gallo properties and have failed

to show how they are injured or likely to be injured by the County's preliminary approval of the subdivision of the Dankers and Gallo properties. CP 51. They presented no evidence of injury or likely injury to themselves or their property at the hearing before the hearing examiner. CP 333-34. In their response to the motion for summary judgment to dismiss their LUPA petition, the Mangats offered no declarations showing any injury they had suffered or were likely to suffer as a result of the land use decision granting preliminary approval of the subdivision of the Dankers and Gallo properties. Absent a showing of injury in fact, the Mangats lacked standing under LUPA and their LUPA petition was properly dismissed.

b. Appellant's Claim Not Within the Zone of Interest. The Appellants are also not "another person aggrieved or adversely affected" entitled to standing under RCW 36.70C.060(2) because they failed to meet the condition under subsection (b) that their "asserted interest are among those that the local jurisdiction was required to consider when it made the land use decision." The interest that the Appellants have asserted in their LUPA petition is that they held an ownership interest in the application for the subdivision of the Danker's and Gallo's land, which the County improperly took from them and allowed the Dankers and Mr. Gallo to continue processing the application they had started. The Appellant's statements of error set forth in their LUPA petition all relate to their

assertion that they "owned" rights in the subdivision application. Their statement of errors in the LUPA petition are as follows:

> Error 1: The County engaged in unlawful process in finding ownership of the Mangats' application ran with the land and/or 2007 vesting date inures to Gallo and Dankers.
>
> Error 2: The County violated the constitutional rights of the Mangats in finding the Mangats application ran with the land and/or 2007 vesting date inures to Gallo and Dankers.
>
> Error 3: The County erroneously found the Mangats' application ran with the land and/or 2007 vesting date inures to Gallo and Dankers.
>
> Error 4: The County erroneously found that the Hearing Examiners decision is consistent with the County's Master Permit Application process.
>
> Error 5: The County erroneously relied upon Judge Krese's order.
>
> Error 6: The County erroneously relied upon Judge Leach's ruling.
>
> Error 7: The County erroneously found that allegations were without merit on their face and frivolous. CP 492-499.

Their reference in error No. 6 to the County's reliance on Judge Leach's ruling is a reference to Judge Leach's denial to the Mangat's motion for a preliminary injunction to block the hearing on the subdivision application for the Dankers and Gallo property in their prior lawsuit against Snohomish County, the Dankers and Mr. Gallo under Snohomish County Cause No. 11-2-038763-5. Reference in error No. 5 to Judge

Krese's order is reference to this trial judge's decision in another case in which he ruled that subdivision applications ran with the land. Thus, all of the errors cited in the Appellant's LUPA petition relate only to their assertion that they had rights in the subdivision application which the County failed to honor.

The Mangats appealed the hearing examiner's preliminary approval of the subdivision application to the Snohomish County Council. The Snohomish County Council summarized the issue raised by the Mangats in their appeal as follows:

> All of the alleged errors raised by Appellants [Mangats] in this appeal arise out of a single issue involving whether the Applicant [Gallo and Dankers], as the owner of the underlying property, has the right to continue processing of a subdivision application originally filed by Appellants [Mangats] in September 2007 as the then contract purchasers of the subject property. The Appellants' [Mangats] interest in the subject property terminated upon expiration of their contract to purchase the property effective December 15, 2009. CP 506.

In dismissing the Mangat's appeal, the Snohomish County Council entered the following conclusions:

> 2. The County Council concludes that the Appellants' [Mangats] challenges to the Hearing Examiner's decision as it relates to alleged constitutional violations of due process and taking of private property are beyond the scope of the jurisdiction of the Hearing Examiner in this matter and beyond this Council's jurisdiction for purposes of review,

> and therefore summarily dismiss them pursuant to SCC 30.72.075.
>
> 3. As for all other remaining allegations challenging the Hearing Examiner's findings of Fact and/or Conclusions of law, the County Council finds them to be without merit on their face and frivolous, and therefore summarily dismisses them pursuant to SCC 30.72.075.
>
> 4. The Hearing Examiner's conclusion that a land owner has the right to proceed with a land use application affecting his or her real property is consistent with the County's Master Permit Application process which requires that an applicant certify that they have an interest in the real property which is the subject of the land use application in order to submit an application, and it is also consistent with two recent Superior Court rulings that the ownership of a plat application runs with the land. CP 508.

The reference in conclusion No. 4 to two recent Superior Court rulings is a reference to Judge Krese's order and Judge Leach's ruling cited in Error's No. 5 and 6 of the Appellant's LUPA petition.

The Snohomish County Council was correct in its assessment that the issues raised by the Mangats concerning their claim of "ownership" of the application and a "taking" of that property interest were beyond the scope of the jurisdiction of their hearing examiner and the Snohomish County Council in reviewing and deciding upon an application for the subdivision of land. Under RCW 58.17, the County was charged with considering and protecting certain public interests in its decision on whether to approve the subdivision of the Dankers and Gallo properties. It was charged with assuring that the subdivision complied with all local

zoning requirements as well as applicable state regulations. The adjudication of rights as between the Mangats and Mr. Gallo and the Dankers was beyond the scope of interests the hearing examiner and the Snohomish County Council were to consider in deciding whether to grant preliminary approval of the subdivision of this land.

The adjudication of rights between the Mangats and the Dankers and Mr. Gallo was properly within the jurisdiction of the Superior Court. The Mangats understood that jurisdiction for resolution of this dispute lay with the Superior Court when they commenced their lawsuit in March, 2011 under Snohomish County Superior Court Cause No. 11-2-03863-5, in which they sought to enjoin the County from processing the subdivision application upon the basis that the application constitutes their personal property. They obtained a hearing before Judge Leach on May 3, 2011 on their motion for a preliminary injunction to stop the hearing on the subdivision application. They fully briefed and argued their position that they held an ownership interest in the application. Judge Leach ruled against them in an oral ruling on May 3 and entered his written decision on May 16 which clearly decided the issue of ownership of the application against the Mangats and included the following findings:

> 6. The filing of the subdivision application by plaintiffs with Snohomish County was merely a request to develop the subject property. While the filing of an application vests certain development rights as they relate to the subject

> property, there can be no ownership interest in the application itself independent of the real property to which it pertains. Any vested rights created by the filing of such an application belong to the landowner who has the right to develop the property.
>
> 7. The County's decision to continue to process the application for the subdivision of the property owned by Dankers and Gallo after Mangat's default under the contract did not constitute a taking of any property right or interest held by Mangat.
>
> 8. When they defaulted under the contract, the plaintiffs lost the right to purchase the property and were required to turn over to the Dankers and Gallo the maps, drawings, reports and other work product related to the subdivision of the land. There is nothing left for them to own.
>
> 9. The plaintiffs have made no showing of a legal right which is threatened by the actions of Snohomish County or the other defendants. CP 298.

Judge Leach's order denying the Mangat's motion for a preliminary injunction was followed by cross motions for summary judgment heard before Judge Kurtz on August 17, 2011. The Mangat's position on its ownership of an interest in the application and the "taking" of that interest by the County and awarding it to Dankers and Gallo was fully briefed and argued before Judge Kurtz. Judge Kurtz also ruled against the Mangats and granted the defendants' motion dismissing the Mangat's claims for injunctive relief and damages. Having had their claims concerning an interest in the application fully heard and decided by superior court judges, the Mangats should not have expected the hearing examiner and the Snohomish County Council to consider the claims as

part of the approval of the subdivision application and reach a different conclusion.

In conclusion, adjudication of their ownership claim in the application and claims for unlawful "taking" was not within the interests that the County was required to consider when making its decision on preliminary approval of the subdivision of the Gallo and Danker's land. Therefore, the Appellants have failed to meet the condition set forth in RCW 36.70C.060(2)(b) and lack standing under LUPA.

Perhaps because they realize they do not meet the requirements of RCW 36.70C.060(2), appellants suggest in their opening brief that they be allowed to amend their pleadings to assert standing under RCW 36.070C.060(1) as a former applicant. Amending a pleading through an opening brief on appeal, is of course, inappropriate.

2. If The Appellant's LUPA Petition is Dismissed, Its Claim For A Writ of Prohibition Must Also Be Dismissed.

Our appellate courts have consistently held that LUPA is the only means of judicial review of a land use decision and that other causes of action based on a challenge to a land use decision must fail, if a party's cause of action under LUPA fails.

In Asche v. Bloomquist, 132 Wash. App. 784, 133 P.3d 475 (2006), the plaintiffs brought an action for public nuisance and writ of mandamus on the grounds that Kitsap County had improperly issued a

building permit for construction of a house on their neighbor's property, which would block their view of Mt. Rainier. The court ruled that their challenge to the issuance of the building permit was barred by the 21-day statute of limitations under LUPA. The plaintiffs argued that they were entitled to enjoin the construction of the house under theories of violation of due process and public nuisance. The court held: "Having failed to file a land use petition within 21 days of the building permits issuance, they have lost the right to challenge its validity." ***Id. at 799***. The court further found that the plaintiff's nuisance claims were premised on challenging the invalidity of the building permit, a challenge which should have been brought under LUPA. The court noted that to prevail on the public nuisance claim, the plaintiffs would need an interpretive ruling by the court that the building permit was improperly issued. The court ruled that the plaintiffs could not seek such a determination under a public nuisance theory when they failed to timely bring a challenge to the building permit under LUPA to obtain that interpretive ruling.

In Mercer Island Citizens for Fair Process v. Tent City 4, 156 Wash. App. 393, 292 P.3d 1163 (2010), a neighborhood group sought a temporary restraining order and injunction to block the implementation of a Temporary Use Agreement issued by the City of Mercer Island for operation of Tent City 4 on a church's property. The neighborhood group had failed to file a timely petition under LUPA, but argued it was entitled

to injunctive relief under theories of public nuisance and due process violations. Dismissing the plaintiff's cause of action, the court of appeals held:

> The case law also recognizes that failure to challenge a land use decision under a LUPA Petition bars any claims that are based on challenges to the land use decisions, including alleging due process violations. ***Id. at 402***.

Similarly, in Grand Master Shen-Yen Lu v. King County, 110 Wash. App. 92, 38 P.3d 104 (2002), the court held that the plaintiffs could not maintain a declaratory action on a land use decision, when they have an adequate alternative remedy under LUPA. In upholding the dismissal of the declaratory judgment action, the court stated, "The Land Use Petition Act (LUPA) generally provides the exclusive means of judicial review of the final land use decisions." ***Id. at 95***.

In Grundy v. Back Family Trust, 116 Wash. App. 625, 67 P.3d 500 (2003), Ms. Grundy claimed that Thurston County improperly exempted her neighbors seawall project from the permitting process and thereby created a public nuisance. She sought to invalidate the permit allowing her neighbor to raise their seawall and for orders of abatement. The trial court granted a motion for summary judgment dismissing her claims for a public nuisance on the grounds that Ms. Grundy had failed to challenge the permit under LUPA. On appeal, Ms. Grundy argued that LUPA should not apply, because she lacked standing under LUPA. She further

argued that she was entitled to bring a public nuisance claim as an original action under Chapter 7.48, RCW. The Court of Appeals disagreed with her arguments and upheld the dismissal of her public nuisance claim stating:

> Grundy's public nuisance argument hinges solely on her assumption that the exemption was unlawful. Under *Nykreim* the exemption is necessarily valid because Grundy failed to challenge it under LUPA. Thus there is no basis for Grundy's public nuisance claim. Grundy argues that she can bring a public nuisance claim as an original action under Chapter 7.46 RCW. But LUPA is the exclusive avenue for appealing a land use decision (citations omitted). Even assuming Grundy lacked standing under LUPA, that would not mean that she could challenge the decision in another forum. One who lacks standing under LUPA cannot appeal a land use decision at all. ***Id. at 632***.

In this case, the Appellants request for a writ of prohibition seeks to set aside the same land use decision which is the subject of their LUPA appeal and is based upon the same claim that the appellants had an ownership interest in the subdivision application which the County failed to honor. Since LUPA is the exclusive judicial means for review of the County's decision to grant preliminary approval of subdivision of the Dankers and Gallo properties, the Appellants cannot challenge that land use decision through an action for writ of prohibition. Under the above referenced case law and RCW 36.70C.030, the Appellants only means of challenging the preliminary approval of the subdivision of the Dankers

and Gallo properties is through LUPA, and if their LUPA appeal is dismissed, their action for writ of prohibition must also be dismissed.

3. Appellant's Action Was Properly Dismissed Under the Doctrines of Res Judicata And/or Collateral Estoppel Because the Appellants Seek to Re-litigate Claims And Issues Decided In A Prior Lawsuit.

In March 2011, the Appellants commenced an action against Snohomish County, the Dankers and Mr. Gallo under Snohomish County Superior Court Cause No. 11-2-03863-5. (the "Prior Lawsuit"). In that action, the Appellants alleged an ownership interest in the application for the subdivision of the Dankers and Gallo properties and claimed the Snohomish County had unlawfully "taken" that property right from them and assigned it to the Dankers and Mr. Gallo. They sought an injunction to stop the processing of the application and money damages from Snohomish County for an unlawful "taking" of property. Judge Leach denied Appellant's motion for a preliminary injunction in that action and the entire action was dismissed by Judge Kurtz on August 17, 2011 by an order granting defendants' motion for summary judgment.

In Shoemaker v. City of Bremerton, 109 Wash 2d. 504, 745 P.2d 858 (1987), the Washington State Supreme Court provided the following distinction between the doctrines of res judicata and collateral estoppel:

> The general term res judicata encompasses claim preclusion, (often itself called res judicata) and issue preclusion, also known as collateral estoppel. Under the former a plaintiff is not allowed to recast his claim under a different theory and sue again. Where a plaitiff's second claim clearly is a new, distinct claim, it is still possible that an individual issue will be precluded in the second action under the doctrine of collateral estoppel or issue preclusion. In an instance of claim preclusion, all issues which might have been raised and determined are precluded. In the case of issue preclusion, only those issues actually litigated and necessarily determined are precluded. *Seattle-First Nat'l Bank v. Kawachi*, 91 Wash.2d 233, 228, 588 P.2d 725 (1978). ***Id. at 507.***

The Court in Shoemaker found that the doctrine of collateral estoppel applied and set forth the elements of collateral estoppel:

> The elements of collateral estoppel have been stated as follows:
>
> (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.
>
> *508 *Malland v. Department of Retirement Sys.*, 103 Wash.2d 484, 489, 694 P.2d 16 (1985); *Rains v. State*, 100 Wash.2d 660, 674 P.2d 165 (1983). ***Id.***

Res Judicata is based on a policy designed to curtail multiplicity of actions by parties who have had an opportunity to litigate the same matter in a former action. Karlberg v. Otten, 167 Wn. App. 522, 280 P.3d 1123, 1130 (2012). A subsequent action is barred if it is identical to a previous action in four respects:

(1) Same subject matter;
(2) Same cause of action;
(3) Same persons and parties.
(4) Same quality of the persons for or against whom the claim is made.

Hayes v. City of Seattle, 131 Wn.2d 706, 712, 934 P.2d 1179, 943 P.2d 265 (1997).

With respect to whether the same cause of action is involved, the Court in Hayes provided the following guidance:

> In deciding whether two causes of action are the same we are to consider the following four factors:
> (1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. ***Id. at 713***.

There must be a final decision on the merits to invoke res judicata and summary judgment fulfills this criteria. In re Estate of Black, 153 Wn.2d 152, 170, 102 P.3d 796, 806 (2004).

Courts will invoke the doctrine if a claim could have or should have been brought in the preceding action. Sanwick v. Puget Sound Title Ins. Co., 70 Wn.2d 438, 441-442, 423 P.2d 624, 627 (1967); see also Karberg, supra. Limitations to this exclusion include claims which were not in fact adjudicated Seattle-First Nat. Bank v. Kawachi, 91 Wn.2d 223, 226, 588 P.2d 725, 728 (1978) or claims arising out of the same

transaction that may have been joined at trial but have an independent basis. Hayes, 131 Wn.2d at 714.

Under the doctrine of res judicata the appellants' claims for writs of prohibition and mandamus must be excluded because they are the same claim they asserted in the Prior Lawsuit recast under a different theory. In the Prior Lawsuit they asked the court to issue an injunction to stop the processing of the application for the subdivision of the Danker and Gallo properties based on their claim that they own the application. In this subsequent action they seek the same result through a writ of prohibition based on the same claim that they own the application and the County should not allow Dankers and Gallo to proceed under it. In the Prior Lawsuit they sought damages from the County for compensation for the "taking" of their property rights in the subdivision application. In this subsequent action, they seek the same compensation under principles of condemnation law through a writ of mandamus. The Mangats could have asked for writs of mandamus and prohibition in the Prior Lawsuit, contrary to the suggestion in their opening brief that actions for such writs could not be brought until after the decision of the County on the subdivision application. On April 5, 2011, the hearing examiner denied the Mangat's request for a postponement of the hearing on the application. Certainly, the superior court in the Prior Lawsuit could have issued a writ

of prohibition if it found the County's hearing on preliminary approval of the plat exceeded its jurisdiction.

It should be noted that there is no legal basis for a writ of prohibition in light of the injunctive remedies the Mangats sought in the Prior Lawsuit. By statute a writ of prohibition is used to halt the proceedings of a tribunal "when such proceedings are without or in excess of the jurisdiction of such tribunal.... "RCW 16.290 A court is authorized to issue a writ of prohibition only "where there is not a plain, speedy and adequate remedy in the ordinary course of law." RCW 7.16.300. In this case, the Mangats have not questioned the jurisdiction of the hearing examiner and the County to make a decision on preliminary approval of the subdivision of the Dankers and Gallo property. Rather, they challenge the decision the County made to grant preliminary approval. Moreover, a writ of prohibition in this case would not issue as a matter of law, because the Mangats had a plain, speedy and adequate remedy which they, in fact, sought to exercise. They commenced the Prior Lawsuit to obtain a preliminary injunction to halt the hearing on the subdivision application and then obtain declaratory relief and a permanent injunction or damages on their claim of an ownership interest in the subdivision application. The remedy of injunctive relief was speedy and adequate. Judge Leach simply found that the Mangats were not entitled to that remedy.

The appellants' claims in the Prior Lawsuit were fully briefed and argued on cross motions for summary judgment and were dismissed. The result of that judgment would, indeed be impaired and rendered meaningless if the appellants can prosecute actions for writs of prohibition and mandamus. This second action involves the same evidence and claims of rights and arises out of the same transaction as was involved in the Prior Lawsuit. Since the actions for writs of prohibition and mandamus in this case involve the (1) same subject matter, (2) the same cause of action, (3) the same persons and parties and (4) the same quality of persons for or against whom the claim is made, as was involved in the Prior Lawsuit, such actions are barred under res judicata and were properly dismissed.

For the reasons cited above for dismissal of claims for writs of prohibition and mandamus, the appellants' LUPA petition was also properly dismissed under the doctrine of res judicata. The appellants appear to argue that LUPA is a new and distinct claim which did not arise until after the final decision by the Snohomish County Council. If the Court concurs with such a characterization of their LUPA appeal, then the LUPA appeal was properly dismissed on the basis of collateral estoppel. The LUPA appeal raises the very same issue the appellants raised in the Prior Lawsuit, namely that they owned the application and the County erred in allowing the property owners, Dankers and Gallo, to continue to

process the application for the subdivision of their property. That issue was decided against the appellants in Judge Kurtz's ruling on cross motions for summary judgment and dismissal of their complaint. They should not be permitted to relitigate this issue under the guise of a LUPA appeal. There is no evidence that application of the doctrine of collateral estoppel in this action will work as injustice against the appellants. In the Prior Lawsuit they had full opportunity to litigate to judgment the issues of their claim of ownership of the subdivision application and the County's decision to allow the property owners to proceed with the application. Allowing the appellants to relitigate the same claims and issues would be a waste of judicial resources and would open the door to inconsistent results.

Thus, the appellants LUPA petition and complaint for writs of prohibition and mandamus were properly dismissed under the doctrines of res judicata and/or collateral estoppel.

IV. REQUEST FOR ATTORNEY FEES

Pursuant to RAP 18.1, respondents Dankers and Gallo request an award of the reasonable attorney's fees and costs they have incurred in this appeal as allowed under RCW 4.84.370. RCW 4.84.370 provides in full:

> (1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building

> permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:
>
> (a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and
>
> (b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.
>
> (2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

In Habitat Watch v. Skagit County, 155 Wash.2d 397, 120 P.3d 56 (2005), the Washington Supreme Court applied RCW 4.84.370 to award reasonable attorney fees to the property owner and Skagit County after it affirmed the rulings of the trial court in their favor. In Habitat Watch, a neighborhood group filed a LUPA action to challenge a special use permits and a grading permit for construction of a golf course near their properties. They appealed the decision of the hearing examiner and the board of county commissioners to not revoke the special use permits. The trial court found against Habitat Watch as a matter of law. On direct review, the Supreme Court affirmed the dismissal of Habitat Watch's action. On the application of RCW 4.84.370 the Court commented:

> Under this statute, parties are entitled to attorney fees only if a county, city, or town's decision is rendered in their favor and at least two courts affirm that decision. The possibility of attorney fees does not arise until a land use decision has been appealed at least twice: before the superior court and before the Court of Appeals and/or the Supreme Court. RCW 4.84.370(1). Thus, parties challenging a land use decision get one opportunity to do so free of the risk of having to pay the other parties' attorney fees and costs if they are unsuccessful before the superior court. See *Baker v. Tri-Mountain Res., Inc.*, 94 Wash. App. 849, 854, 973 P.2d 1078 (1999). ***Id.***

Like the property owners in Habitat Watch, respondents Dankers and Gallo received rulings in their favor before the Snohomish County Council and the Snohomish Superior Court. The Mangats have brought this appeal of respondents' plat to the Court of Appeals. If respondents Dankers and Gallo prevail in the Court of Appeals, they are clearly entitled to an award of reasonable attorney fees and costs under RCW 4.84.070.

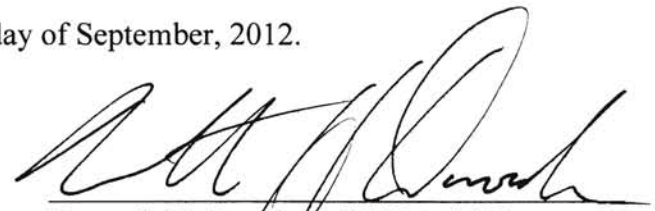
V. CONCLUSION

The Mangats' LUPA petition was properly dismissed for their lack of standing under RCW 36.70C.060 because they are not "another person aggrieved or adversely affected by the land use decisions required under RCW 36.70C.060(2)(b). Under RCW 36.70C.030 and the case law interpreting it, the Mangats cannot challenge the land sue decision through a writ of prohibition, if their LUPA action fails, and their action for a writ of prohibition was properly dismissed. Additionally, since they are attempting to litigate for a second time claims and issues dismissed by

summary judgment in the Prior Lawsuit, this action was properly dismissed under res judicata and/or collateral estoppel.

If they prevail in this appeal, Dankers and Gallo are entitled to an award of reasonable attorney fees and costs under RCW 4.84.370

Dated this 7th day of September, 2012.



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IN THECOURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION ONE

In the Matter of

KHUSHDEV MANGAT and HARBHAJEN MANGAT,

Appellants

vs.

SNOHOMISH COUNTY, LUIGI GALLO, JOHANNES DANKERS and MARTHA DANKERS,

Respondents

DECLARATION OF SERVICE

I, Abigail A. Landes, declare under the penalty of perjury that I caused a copy of the Brief of Respondents Luigi Gallo, Johannes Dankers and Martha Dankers to be served via e-mail and ABC Messenger Service upon and addressed to the following individuals:

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I, Abigail A. Landes, also declare under the penalty of perjury that I filed an original of Brief of Respondents Luigi Gallo, Johannes Dankers and Martha Dankers with the Clerk of the Court of Appeals Division One via ABC Legal Messenger Service for delivery to the Appellate Court Division I, Seattle, Washington.

Dated: September 7, 2012, at Kirkland, Washington.

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