No. 89378-1

SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals Case No. 67712-8-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

KHUSHDEV MANGAT and HARBHJAN MANGAT

Petitioners/Appellants

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

Respondents

RESPONDENT SNOHOMISH COUNTY'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

This case involves the simple question of whether a contract purchaser of real property can retain any interest in a subdivision application pertaining to said property after the contract to purchase expires due to the purchaser's inability to close. In the present case, Respondent Snohomish County ("County"), allowed the underlying landowners, Respondents Luigi Gallo and Johannes Dankers and Martha Dankers ("Gallo and Dankers"), to continue to process a subdivision application originally filed by Petitioners/Appellants Khushdev Mangat and Harbhjan Mangat ("Mangat"), as contract purchasers of the Gallo and Dankers property, after the Mangats' contract to purchase had expired.

The Mangats objected, claiming that the "vested rights" under the subdivision application belonged to them as their personal property and, thus, that the County was effecting a "taking" of their property interest in the application by allowing Gallo and Dankers to continue to process the subdivision application without the express consent or assignment of the Mangats claimed interest in the application. This action was subsequently commenced by the Mangats as a Complaint for Declaratory and Injunctive Relief seeking to restrain the County from processing the application or, in the alternative, seeking damages for alleged wrongful taking of the Mangats' claimed interest in the application.

Both the trial court and the Court of Appeals rejected the Mangats' argument on the grounds that zoning and permit rights arising under land use applications run with the land, not with the person applying for the permits. See Published Opinion Court of Appeals, Case No. 67712-8, at 6, citing Clark v. Sunset Hills Memorial Park, 45 Wn.2d 180, 273 P.2d 645 (1954).[1] As held by this Court in Clark, land use permit applications do not confer purely personal privileges or licenses, but rather, create rights which run with the land. Clark, 45 Wn.2d at 190 (holding: "These powers do not contemplate the restriction or authorization of land use on the basis of ownership by particular persons.")

Consequently, both the trial court and the Court of Appeals held that once the Mangats ceased having any interest in the real property which was the subject of the subdivision application, there was no right or interest they could retain in the application for purposes of being entitled to restrain the further processing of the application and/or seeking damages for alleged "taking" of the Mangats' interest therein as follows:

> The filing of the subdivision application by plaintiffs with Snohomish County was merely a request to develop the

[1] As an alternative grounds for dismissing the Mangats' claim, both the trial court and the Court of Appeals also cited the plain language of the Mangats' Purchase and Sale Agreement which required them to turn over to Gallo and Dankers as the Sellers all written documents relating to the development of the property in the event of termination of the Purchase and Sale Agreement. See Published Opinion Court of Appeals, at 9-10. The County incorporates by reference the Answer of Respondents Gallo and Dankers to the Petition for Review dated October 17, 2013, filed herein.

> subject property. While the filing of an application vests certain 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 legal right to develop the property.

See Published Opinion Court of Appeals, at 10, quoting trial court's Order Denying Motion for Preliminary Injunction, CP 560-63.

While the decision is arguably of substantial public interest, it is based on a rule of law already determined by this Court in 1954 with the ruling in Clark v. Sunset Hills Memorial Park, supra, and subsequently reaffirmed by this Court in Hull v. Hunt, 53 Wn.2d 125, 130, 331 P.2d 856 (1958) (recognizing that the rights arising under a land use permit can only be exercised by one acquiring title or possession of the property which is the subject of the land use application.) Indeed, as noted by the Court of Appeals, it is the Mangats who ask this Court to deviate from that rule of law and adopt a novel theory as follows:

> The Mangats next contend that any rights provided by a development permit do not attach to the land until the permit is actually approved. [footnote omitted] From this premise, the Mangats argue there is a right of "processing of the application" that "cannot be enjoyed" by an owner who is not an applicant. We disagree. The Mangats argue that the subdivision process is not an in rem proceeding until there is a preliminary plat approval. But as Dankers and Gallo point out, this would mean that "the vested rights of a subdivision application float as personal property rights of the applicant to be assigned and governed by the applicant's whim until

> the moment of preliminary approval of the subdivision, when they then attach to the real property." Response Brief of Dankers at 25. The Mangats have cited no authority for this novel legal theory and we decline to adopt it.

See Published Opinion Court of Appeals, at 8.

Accordingly, the appeal in this matter does not raise an issue of substantial public interest that has yet to be determined by this court warranting review under RAP 13.4(b)(4); Rather, it involves the application of an established rule of law. Based on such rule of law, it follows that the Mangats had no property interest they could retain in the subdivision application once their interest as contract purchasers in the real property expired. This, in turn, is consistent with the holding in Hull v. Hunt, supra, recognizing that the rights arising under a land use application can only be exercised by one who has acquired a right of title or possession to the real property.

Having ceased to have any interest in the subject property prospective or otherwise, the Mangats had no property interest they could retain in the subdivision application for purposes of alleging a claim of unconstitutional taking. For this reason, the appeal in this matter likewise does not involve a significant question of law under the Constitution of the State of Washington or of the United States for purposes of this Court accepting discretionary review in this matter under RAP 13.4(b)(3).

II. ISSUES PRESENTED FOR REVIEW

A. Does the decision of the Court of Appeals involve an issue of substantial public importance that has not previously been determined by the Supreme Court warranting review under RAP 13.4(b)(4)?

B. Does the decision of the Court of Appeals involve a significant question of law under the Constitution of the State of Washington or of the United States warranting review under RAP 13.4(b)(3)?

C. Is the decision of the Court of Appeals in conflict with a decision of the Supreme Court or another decision of the Court of Appeals warranting discretionary review under RAP 13.4(b)(1) or (2)?

III. STATEMENT OF THE CASE

The facts in this matter are undisputed and, for purposes of responding to the Mangats' Petition for Discretionary Review, may be limited to the following: The Mangats were contract purchasers of certain adjoining parcels of real property owned by Defendants Gallo and Dankers. (CP 630). An Addendum to the Purchase and Sale Agreement provided that the Mangats were to submit a subdivision application for the property following expiration of a feasibility contingency, and required Gallo and Dankers to consent and otherwise execute all necessary applications as follows:

> ***Seller will cooperate in signing such applications and other documents as may be required by the County*** to obtain preliminary approval of the subdivision of the property. The Buyer will promptly provide the Seller with copies of the subdivision application, plat map and all submittals it makes to the County, as well as all soil studies, wetland studies and delineations, streams studies, engineering drawings, topographical surveys and other reports, maps and drawings prepared by professionals and consultants hired by the Buyer to assist in the development of the property. ***In the event the Buyer terminates this agreement under the feasibility Contingency Addendum or defaults on the terms of this agreement, the Buyer shall promptly turn over to the Seller all*** studies, reports, letters, memorandums, maps, drawings ***and other written documents*** prepared by surveyors, engineers, biologists and other experts and consultants retained by the Buyer to assist in the planning of the development of the property. [emphasis added]

(CP 648, Addendum to Vacant Land Purchase and Sale Agreement).

As noted above, Gallo and Dankers were required to cooperate and sign all applications as necessary to obtain preliminary subdivision approval. The County's Master Permit Application, together with RCW 58.17.165, requires that any subdivision of land be made with the consent of the owner. (CP 962-95). Accordingly, the underlying landowner is a necessary party to any subdivision of land. The Mangats were unable to secure financing to close the purchase and sale of the property and the purchase agreement expired effective December 16, 2009. (CP 631-32). Thereafter, in May 2010, Gallo and Dankers submitted a request to resume processing the subdivision application as the underlying landowners. (CP 689).

The County allowed Gallo and Dankers to continue processing the subdivision application and revise the same where after the Mangats commenced the present action on March 22, 2011, as a Complaint for Declaratory and Injunctive Relief, seeking to restrain the County from taking further action. (CP 796-803). As stated in their complaint, the Mangats alleged that the subdivision application constituted their personal property as follows:

> It is the position of the Mangats that the permit rights, as related to the permit Application, which has not received final approval from Snohomish County, constitutes personal property owned by the Mangats, as the applicant, and are not owned by the property owners, Gallo and Dankers.

(CP 798, paragraph 3.14).

The Mangats sought a Preliminary Injunction to enjoin the County from submitting the subdivision application for hearing which was denied by the trial court concluding as follows:

> 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 560-63, Order Denying Motion for Preliminary Injunction).

Thereafter, the Snohomish County Hearing Examiner granted preliminary subdivision approval to Gallo and Dankers on May 17, 2011. (CP 254-69).[2] The parties subsequently filed cross-motions for summary judgment with Defendants Gallo and Dankers seeking dismissal of the Mangats' complaint based upon the contractual provisions in the purchase and sale agreement transferring to Gallo and Dankers as sellers the right to all written documents relating to the development of the property. (CP 455-477). The County moved for summary judgment as a matter of law

[2] On July 5, 2011, the Mangats filed a separate appeal of the preliminary subdivision approval under the Land Use Petition Act (LUPA), Ch. 36.70C RCW, together with related claims for Writ of Mandamus and Writ of Prohibition, asserting the same arguments raised in the present action. (See Snohomish County Superior Court Cause No. 11-2-06519-5). Following issuance of the Order Granting Summary Judgment in the above matter on August 17, 2011, the County moved to dismiss the Mangats' LUPA appeal and related claims based upon collateral estoppel and lack of standing under LUPA, which motion was granted by order dated October 19, 2011. This decision was the subject of a separate appeal filed under Court of Appeals Case No. 68739-5-I, which decision was similarly affirmed by Unpublished Opinion dated August 26, 2013, and is the subject of a separate Petition for Discretionary Review filed by the Mangats, pending under Supreme Court Case No. 89332-2.

based upon the rule that vested rights created under a land use application are "in rem" property rights which attach to and run with the land and, thus, could be exercised by Gallo and Dankers as the underlying property owners. (CP 486-491).

By order dated August 17, 2011, Judge David Kurtz granted both motions for summary judgment, dismissing the Mangats' complaint on alternative grounds that the purchase and sale agreement transferred to Gallo and Dankers all rights in any written documents pertaining to development of the property (which would include the subdivision application); or in the alternative, concluding that as a matter of law the vested rights arising under land use applications are "in rem" property rights which attach to the property and run with the land and, thus, could be exercised by Gallo and Dankers as the underlying property owners. (CP 9-13). The Court of Appeals in this matter likewise affirmed the trial court on both grounds concluding that, as a matter of law, zoning and permit rights run with the land, not with the person applying for the permits; and that under the terms of the purchase and sale agreement the Mangats were required to turn over to the Gallo and Dankers all documents related to the subdivision of the property, entitling Gallo and Dankers to proceed with the subdivision application. (See Published Opinion, at 6, 9-10).

IV. ARGUMENT

A. Grounds for Accepting Discretionary Review.

The Mangats argue that this Court should accept discretionary review in this matter under RAP 13.4(b)(4), which provides as follows:

> A petition for review will be accepted by the Supreme Court only:
> . . .
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

See RAP 13.4(b)(4). In this regard, the Mangats contend that the issue of whether the vested rights arising under a land use application are "in rem" or "in personam" is an issue of substantial public interest ***that has yet to be determined by this court***. (See Petition for Discretionary Review, at 7).

Based on that argument, and assuming that the Mangats were to first prevail on that issue, the Mangats then claim that the County's decision to allow the underlying property owners (Gallo and Dankers) to continue processing the application constitutes a "taking" of the Mangats' property interest in the application, thus, raising a constitutional issue for purposes of seeking review under RAP 13.4(b)(3). The property right taken, according to the Mangats, is their ability to have sold in the marketplace the development rights under the subdivision application. (See Petition for Review, at 14).

B. Petitioners Have Not Met the Grounds in RAP 13.4(b)(4), Warranting Acceptance of Discretionary Review.

The Mangats concede that the holding of this Court in Clark v. Sunset Hills Memorial Park, supra, established the rule that rights arising under a land use application once issued or approved, create "in rem" property rights which run with the land and may be exercised by the underlying property owner and any successor in interest to the real property, regardless of who was named in the application as the permittee. See Petition for Review, at 9; See also Northwest Land and Investment, Inc., v. City of Bellingham, 31 Wn. App. 742, 743, 644 P.2d 740 (1982) (holding that a successor in interest to real property which was the subject of a preliminary plat approval at the time of acquisition has standing to file a revised final plat design and challenge conditions of approval). This is clearly the rule throughout the nation as summarized in that review of applicable case law cited at page 16-18 of the County's Response Brief filed in the Court of Appeals.

Notwithstanding such rule, the Mangats argue that the holding in Clark should be limited to merely addressing the nature of the rights arising ***after*** a land use permitting decision is issued and should not be construed as governing the nature of such rights in a land use application existing prior to permitting approval. See Petition for Review, at 9. As

noted in the Opinion of the Court of Appeals, there was no authority cited by the Mangats for this distinction below, nor any cited to this Court in support of the Mangats Petition for Review.

Rather, the only argument the Mangats make for limiting the holding of this Court in Clark is a public policy argument that because vested rights have the potential to create non-conforming land uses, they should be restricted and not viewed as running with the land for purposes of enabling someone other than the named applicant/developer to assert. See Petition for Review, at 11. However, in the same breath, the Mangats argue in support of their "takings" claim that they should be allowed to "leverage the advantages obtained" as the named applicant and to be free to alienate and negotiate for the sale and transfer of those same rights in the marketplace. See Petition for Review, at 14-15. The argument is boldly stated by the Mangats in their Petition for Review as follows:

> There has never been any dispute that the vesting date accorded the Mangats as of October 22, 2007, which gave the Mangats rights which allowed them to seek development of another's property without complying with more recently enacted Critical Ordinances, had significant monetary value ***which could be sold in the marketplace.*** [emphasis added]

See Petition for Review, at 14.

The rule advocated by the Mangats (i.e. that rights under a land use application are the personal property of the named applicant and can be

sold in the marketplace), creates the very prospect of "speculation" in land use applications rejected by this Court in Hull v. Hunt, supra, in response to a similar argument raised by the City of Seattle stating as follows:

> The corporation counsel of the city of Seattle in his brief amicus curiae expresses the fear that such a rule - coupled with a holding that the applicant for the permit does not have to be the property owner - will result in speculation in building permits. However, the cost of preparing plans and meeting the requirements of most building departments is such that ***there will generally be a good faith expectation of acquiring title or possession for the purposes of building***, particularly in view of the time limitations which require that the permit becomes null and void if the building or work authorized by such permit is not commenced within a specified period. [emphasis added]

Hull, 53 Wn.2d at 130.

As recognized by the Court in Hull v. Hunt, the rights arising under a land use application can only be exercised by one acquiring title or possession of the property which is the subject of the application and, thus, has the right to actually develop the property. For this very reason, the Court of Appeals rejected the Mangats attempt to limit the holding in Clark stating as follows:

> The Mangats next contend that any rights provided by a development permit do not attach to the land until the permit is actually approved. [footnote omitted] From this premise, the Mangats argue there is a right of "processing of the application" that "cannot be enjoyed" by an owner who is not an applicant. We disagree. The Mangats argue that the subdivision process is not an in rem proceeding until there is a preliminary plat approval. But as Dankers and Gallo point

> out, this would mean that "the vested rights of a subdivision application float as personal property rights of the applicant to be assigned and governed by the applicant's whim until the moment of preliminary approval of the subdivision, when they then attach to the real property." Response Brief of Dankers at 25. The Mangats have cited no authority for this novel legal theory and we decline to adopt it.

See Published Opinion Court of Appeals, at 8.

For the reasons set forth above, the issue presented in the Mangats' Petition for Review has been adequately determined by this Court in its prior decision in Clark, supra, which the Court of Appeals correctly applied to the facts in this matter to conclude that the rights arising under the subdivision application filed by the Mangats, run with the land and, thus, the Mangats could retain no property right or interest in the application once their interest in the real property terminated.

C. Petitioners Have Not Met the Grounds in RAP 13.4(b)(3), Warranting Acceptance of Discretionary Review.

The Mangats' Petition for Review only raises a constitutional "takings" issue if the Court first concludes that the Mangats had some right they could retain in the subdivision application notwithstanding termination of any interest in the real property itself; and if the Court concludes that Gallo and Dankers, as the underlying property owners, did not have an independent right to proceed with processing of the

application. On both counts, the Mangats fail to raise any issue warranting discretionary review in this matter.

As set forth above, the rule first announced by this Court in Clark establishes that rights arising under a land use application are "in rem" property rights which run with the land, and are not the personal property rights of the applicant or permittee. Accordingly, as the underlying owners of the real property, Gallo and Dankers were entitled as a matter of law to continue processing the subdivision application.

Second, the contractual provisions of the Purchase and Sale Agreement did in fact require the Mangats to turn over to Gallo and Dankers "all written documents" relating to the development of the property in the event of termination of the Purchase and Sale Agreement. (CP 648, Addendum to Vacant Land Purchase and Sale Agreement). As found by both the trial court and the Court of Appeals, the language of the Purchase and Sale Agreement was clear and unambiguous and required the Mangats to turn over to Gallo and Dankers all documents stating as follows:

> It is further undisputed that after the Mangats failed to complete the purchase, the terms of the agreement required them to give the Dankers and Gallo all documents related to the subdivision of the property, and permitted Dankers and Gallo to proceed with obtaining approval of the plat application.

> In other words, as of December 16, 2009, the Mangats had no interest, prospective or otherwise, in the Dankers' or Gallo's properties. As the trial court explained when it denied the Mangats' motion for a preliminary injunction, there was nothing left for the Mangats to own that could be subject to a taking:. . .

See Published Opinion Court of Appeals, at 9-10. Accordingly, the Mangats' Petition for Discretionary Review does not raise any constitutional takings issue warranting review under RAP 13.4(b)(3), as they had no remaining right or interest in the subdivision application once the Purchase and Sale Agreement was terminated. See Gibson v. Department of Licensing, 54 Wn. App. 188, 194, 773 P.2d 110, *review denied*, 113 Wn.2d 1020 (1989) (holding: "But due process of law is not applicable unless one is being deprived of something to which one has a right.")

D. Petitioners Have Not Met the Grounds in RAP 13.4(b)(1) or (2), Warranting Acceptance of Discretionary Review.

Lastly, the Mangats assert that the decision of the Court of Appeals is in conflict with a decision of this Court and/or another decision of the Court of Appeals, and yet no such decisions are cited in the Petition for Review. Rather, what the Mangats cite are cases involving rules of statutory interpretation which the Mangats claim the Court of Appeals disregarded in rejecting the Mangats strained interpretation of RCW 58.17.033 in support of their claim. (See Petition for Review, at 17-18).

As stated in the Court of Appeals Opinion, the Mangats asserted that the legislative history of RCW 58.17.033 expresses a legislative intent to only permit the named applicant the right to process the application, to the exclusion of other parties who may have an interest in the land. (See Published Opinion Court of Appeals, at 5) However, as noted by the Court of Appeals, the plain language of RCW 58.17.033 merely states that: "an application to divide land is to be considered under the zoning ordinances in effect at the time of the application;" it does not restrict who may be entitled to process the application. Id.

More importantly, the Court of Appeals noted that the Mangats asserted interpretation would be contrary to RCW 58.17.165 which recognizes that any subdivision of land requires the express consent of all parties having any ownership interest in the land. (See Published Opinion Court of Appeals, at 6, fn. 3). Accordingly, the decision of the Court of Appeals was not in conflict with any decision of this Court or other decision of the Court of Appeals regarding application of the rules of statutory construction.

V. CONCLUSION

The decision of the Court of Appeals in this matter is based on a clear application of the rule of law first announced by this Court in Clark v. Sunset Hills Memorial Park, supra, holding that rights arising under a

land use application are "in rem" and run with the land, not with the person applying for the permit. Indeed, it is the Mangats who are asking this Court to deviate from that decision and adopt a distinction which would hold that the rights arising under a land use application, prior to any permitting decision, are purely "in personam" and the personal property of the named applicant to be bought and sold in the marketplace. (See Petition for Review, at 14-15). The Court of Appeals rejected this argument reasoning as follows:

> The Mangats argue that the subdivision process is not an in rem proceeding until there is a preliminary plat approval. But as Dankers and Gallo point out, this would mean that "the vested rights of a subdivision application float as personal property rights of the applicant to be assigned and governed by the applicant's whim until the moment of preliminary approval of the subdivision, when they then attach to the real property." Response Brief of Dankers at 25. The Mangats have cited no authority for this novel legal theory and we decline to adopt it.

See Published Opinion Court of Appeals, at 8.

For the reasons set forth above, the County respectfully urges that this Court likewise decline the Mangats' invitation to accept discretionary review. The primary issue raised in the Petition has previously been determined by this Court as set forth in the decision of the Court of Appeals and there are no other constitutional issues involved nor does the decision conflict with any decision of this Court or other decision of the

Court of Appeals. The Court of Appeal's Published Opinion was correct. The Supreme Court should deny review.

Respectfully submitted this 23rd day of October, 2013.

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DECLARATION OF SERVICE

I, Regina McManus, hereby declare that I am an employee of the Civil Division of the Snohomish County Prosecuting Attorney, and that on this 23rd day of October 2013, Respondent Snohomish County's Answer to Petition for Discretionary Review was served upon persons listed and by the method(s) indicated:

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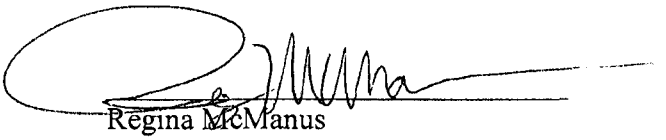
I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Everett, Washington, this 23 day of October, 2013.



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Attached for filing in Mangat v. Snohomish County, et al., (*Mangat I* – Case No. 89378-1), is Respondent Snohomish County's Answer to Petition for Discretionary Review. Please let me know if you have any trouble opening this document. Thank you.

Filed by Regina McManus (425-388-6347), on behalf of:

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