67712-8

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No. 67712-8-I

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

KHUSHDEV MANGAT, et. ux.,

Appellants,

v.

SNOHOMISH COUNTY, et. al.,

Respondents.

CONSOLIDATED REPLY TO BRIEF OF RESPONDENTS/CROSS APPELLANTS JOHANNES DANKERS, MARTHA DANKERS AND LUIGI GALLO AND REPLY TO RESPONDENT SNOHOMISH COUNTY'S RESPONSE BRIEF

Andrew Krawczyk, WSBA #42982
Stafne Law Firm
239 North Olympic Ave.
Arlington, WA 98223
Phone: (360) 403-8700
Fax: (360) 386-4005

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I. INTRODUCTION

COMES NOW Appellant/Cross Respondents Harbhajen and Kushdev Mangat (the "Mangats") and reply[1] to: (1) Brief of Respondents/Cross Appellants Johannes Dankers, Martha Dankers and Luigi Gallo (filed April 4, 2012) (hereafter "Gallo and Dankers' Brief") and (2) Snohomish County's Response Brief ("County's Response Brief") (Briefs of these parties hereafter collectively "Respondents' Briefs") to the Appellants' Opening Brief ("Mangats' Opening Brief") in the above titled matter.

At the heart of the County and Landowners' arguments, is the misguided notion that non-conforming rights are granted by filing an application for a land use permit rather than when a legislative authority determines the application complies with the statute and grants the permit. The gravamen of this appeal is not whether "vested rights" run after permit issuance, but rather, whether Snohomish County Planning and Development Services ("PDS")'s Project Manager Ed Caine could determine that Mangats' potential vested rights (while still subject to legislative approval) could be transferred to owners of the land to be developed (Respondents/Cross Appellants Luigi Gallo and Johannes and Martha Dankers, hereafter "Gallo and the Dankers") and in so doing

[1] Gallo and Dankers filed Cross Review pursuant to RAP 5.1(d), RAP 10.1(f)

extinguish Mangats' exclusive right to transfer, direct, alienate or withdraw their subdivision proposal and the date it is deemed complete for purposes of review. *See* CP 419-423.

Additionally, the County and Landowners argue that the terms of the contract entitle Gallo and Dankers to the application. But this is speculation as to how a court would rule on a judicial proceeding with regard to who owned the application after Mangats' ownership rights in the real estate expired. The Snohomish County Planning and Development Services (PDS) had no right to interpose itself into determining the legal meaning of the contract between the aggrieved parties.

Pursuant to RAP 10.4, sections II-V of this reply brief specifically respond to Cross Appellant/Respondents Gallo and Dankers as to their objection, errors, issues and facts on review. Sections VI below replies to arguments raised in the Respondents' Briefs.

II. CONSOLIDATED BRIEF

On May 7, 2012, the Mangats submitted individual reply briefs to Gallo and Dankers' Brief and County's Response Brief. On May 11, 2012, the Court Clerk entered that the briefs were being returned because "a reply brief should not exceed 25 pages" and to comply by filing a new 25 page brief replying to both response briefs by May 21, 2012. On May 14, 2012, after objecting and raising, among other concerns, that pursuant to

RAP 10.4(b) a 25-page limitation was an error where a cross appeal is concerned, the Court Commissioner entered a notation order that instructed the Mangats to file and serve one reply brief of no more than 50 pages to both respondent and cross appellant/respondent briefs.

III. REPLY TO CROSS APPELLANTS' ASSIGNMENTS OF ERROR

Gallo and Dankers brought a cross appeal against the Mangats relating to the Superior Court's interpretation of the meaning of the real estate contract option to purchase and addendum agreed to by the parties. It is unclear what Gallo and Dankers intended to file (whether it was purely a response to the Appellant's opening brief or the cross appellant's opening brief). RAP 10.3 requires: "A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." *See* RAP 10.3; *see also*, RAP 2.4.[2]

A. Cross Appellants Gallo and Dankers' Failure to Comply with RAP 10.3(a)(4) Means Waiver And Abandonment.

Assignments of error unsupported by argument need not be considered on appeal. *Puget Sound Water Quality Defense Fund v.*

[2] (a) Generally. The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal or, subject to RAP 2.3(e) in the notice for discretionary review and other decisions in the case as provided in sections (b), (c), (d), and (e). The appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent. The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.

Municipality of Metro. Seattle, 59 Wn. App. 613, 800 P.2d 387 (1990). Appellate courts will only review a claimed error that is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto and is supported by argument and citations to legal authority. *Vern Sims Ford, Inc. v. Hagel*, 42 Wn. App. 675, 713 P.2d 736, *review denied*, 105 Wn.2d 1016 (1986). Assignment of error not supported by argument is deemed abandoned. *State ex rel. Helms v. Rasch*, 40 Wn. App. 241, 698 P.2d 559 (1985); *see also*, *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995). An issue cannot be raised for the first time in a reply brief. *State v. Pleasant*, 38 Wn. App. 78, 684 P.2d 761, *review denied*, 103 Wn.2d 1006 (1984). Here Gallo and Dankers' Brief fails to raise any error, but utilize this section to bring unwarranted objections to the Appellants Opening Brief (Mangats' Opening Brief) filed herein.

B. Objection Denied Where Mangats Errors And Issues Were Considered By The Trial Court Below, And In The General Scope Of This Courts' Review

Scope of this Court's Review is described, in part, by RAP 2.4; *see also*, *Heikkinen v. Hansen*, 57 Wn.2d 840, 844-845, 360 P.2d 147 (1961) (Where there is some doubt as to the theory on which the case was decided, we are sometimes able to overcome the difficulty by referring to the oral or memorandum decision of the trial court.)

Gallo and Dankers objected to two assignments of error II B and II D. Mangats argue such objection is not proper where, theories and argument related to Assignment of Error II B (i.e., when the vested right attaches to property - when is it "*in rem*" or "*in personam*") were found, presented, and weighed by the trial court. Verbatim Report of Proceedings ("VROP") at 8-10, 26, 30-33; *see,* e.g., CP 23-26; 90, 104-105, 122, 152-160, 163-166, 167-170, 318, 461, 485. Theories and argument related to Assignment of Error II D, (i.e., can the County allow an underlying landowner continue with the application) were presented and weighed by the trial court. VROP at 5, 20-23, 31-33; *see,* e.g., CP 20-23; 53-55, 65-67, 91-92, 122, 148, 152, 160-163, 167-170, 190-192, 226-227, 280-81, 310-311, 318.

Additionally, error may be raised for the first time where they are "manifest error that affects a constitutional right;" the appellate court can at its discretion consider issues not raised at the trial court. *See State v. Stivason*, 134 Wn. App. 648, 142 P.3d 189 (2006); *State v. Kirkman*, 126 Wn. App. 97, 106, 107 P.3d 133 (2005). This matter also involves questions of constitutional takings and due process (*see* e.g., Appellants' Opening Brief at 10-13), which this Court has discretion to review.

IV. RESPONSE TO STATEMENT OF ISSUES

Gallo and the Dankers filed a Notice of Appeal For Cross Review (Sept. 28, 2011) in this matter, but failed to raise any error related to the subsequent denial of their attorney fees on August 26, 2011, and raise little if anything related to the so called "contract theory". *See* Gallo and Dankers' Brief at 2-4; County's Response Brief at 3-4, FN 1, 24-25.

In reply to Gallo and the Dankers stated issues at ¶¶ 1 and 2, to the extent these issues are related the heart of the issue on appeal, then they are merely characterizations of such appeal; but to the extent that a loss in right to purchase, or turn over "maps, drawings, studies, reports and other documents" are being alleged to be material, the Mangats argue that the Contract terms are immaterial and not properly before the Court on appeal. *See* Gallo and Dankers' Brief at 2-3. In reply to Gallo and Dankers third issue (*id.* at 3) the Mangats argue that they were deprived of certain rights to the application by Snohomish County, which benefited Gallo and Dankers, and the Court may fashion whatever remedy is just and proper.

V. RESPONSE TO STATEMENT OF CASE

A. Counterstatement of the Facts

1. The Mangats are developers who entered into purchase and sale agreements and addendums with Gallo and Dankers to purchase and develop two adjacent tracts. CP 199-212. In the event the Mangats

defaulted they would be required to turn over maps, drawings, studies, reports and other documents. CP 199-212. Gallo and Dankers caused the addendum to be drafted. CP 195. At the time, the Mangats understanding was the addendum terms at issue would allow Gallo and Dankers to file a new subdivision application. CP 196. Gallo and Dankers thought they would get the rights to the application. *See* Gallo and Dankers' Brief at 4; CP 629-631. The terms of the addendum does not state e.g., the application, rights vested in application, completion date, or vested rights, etc.... *See* CP 199-212.

The Mangats, through their consultant Gene Miller, submitted an application (aka subdivision proposal) for Trombley Heights, which was deemed complete on October 22, 2007. CP 219. The application was signed only by the Mangats. CP 410, 481. Snohomish County Code (SCC) states: "Notice of final decision on a project permit application shall issue within 120 days from when the permit application is determined to be complete, unless otherwise provided by this section or state law." SCC 30.70.110(1). The Mangats incurred substantial costs (over $150,000) in submitting and processing their application. *See* CP 142. It was not until February of 2010, that PDS told the Mangats they considered the landowner would have a right to continue the application or

proposal. CP 127, *see also*, CP 46-48, 53-59 (Deposition of Tom Rowe); CP 214-215 (Letter from Bree Urban stating vested rights are *in rem*).

2. The County took longer than expected to process the application. CP 196, 219. As such Mangats, Mr. Gallo and the Dankers negotiated and performed a series of amendments for the closing date of the purchase of the properties in exchange for additional consideration. *See* CP 196, 631. Further delays occurred. CP at 219.[3] Further extensions and amendments were negotiated or utilized. CP at 196. Even further delays occurred, with the last request for additional required information being sought by the County on May 5, 2009. CP 219. Mangats attempted to negotiate a further extension by offering to also transfer the application and other consideration in exchange for more time to close, but Gallo and Dankers refused. CP 196. The Mangats defaulted on December 16, 2009, when they failed to close the property by the last negotiated and amended closing date. CP 196.

3. Mr. Gallo then approached Ed Caine about the subdivision application. CP 120, 416, 446. The Mangats, also approached PDS to determine who had the right to direct the processing of the pending application and whether they could terminate it. CP 120, 196-97, 214-215,

[3] Whether they caused delay, or the review was otherwise arbitrary and capricious, is the subject matter of a related lawsuit brought after the Mangats appealed the Trombley Heights permit issuance to the Snohomish County Council. *See* CP 245, 254-284, 303-314, 327-29, 331-349.

420-421. Ed Caine made the decision to process the application for Gallo and Dankers. CP 214-215, 419-421, 429, 430. While the specific date Mr. Caine made this decision was uncertain, he did so shortly after receiving a letter dated February 22, 2010, from Bree Urban, Prosecuting Attorney, indicating the application "ran with the land". At some undefined point thereafter, PDS requested the applicants each submit their own application. *Id.* Ed Caine's decision was prior to one year elapsing from the last date that additional information was requested and not submitted. *See* CP 219; *see also*, SCC 30.70.110-.140.

4. After Ed Caine's decision, Johannes Dankers and Luigi Gallo submitted applications for Trombley Heights on May 6, 2010, and June 18, 2010, respectively, which, the County processed as substitutions of the applicant and continued to track the original submittal date. CP 415-17, 447-449. This occurred more than one year from the last date that additional information was requested. CP 219. Because these applications used the completion date of the Mangats' application, and because the laws had changed, the project could be proposed and approved with seventeen more lots then had the applications been submitted on May 6, 2010, and June 18, 2010, respectively. CP 129-132, 142. Gallo and Dankers then paid $18,000 in consulting fees and other costs to complete the Trombley Heights application according to what their consultant, Ry

McDuffy, said would be needed to get a recommendation from PDS to the Hearing Examiner for legislative approval. CP 679-682.

5. Preliminary approval of this new application was set for April 12, 2011 when Mangats' new attorney requested a stay on the grounds that Mangats' owned the application and brought the action herein. CP 683.

B. Counterstatement of Procedural History

6. The Mangats incorporate by reference Appellants' Opening Brief at 7-9.

C. Response to Certain Paragraphs of Cross Appellants Statement of the Case

In response to ¶ 13 of Gallo and Dankers' Brief, it is undisputed the Mangats, were the applicants who submitted the Trombley Heights application, which was deemed complete on October 22, 2007, paid the fees associated with submitting the application, and were contract option purchasers when they filed and submitted. CP 195-196; *see* Gallo and Dankers' Brief at 9-10 (paragraph 13). Further, it is undisputed that at all times material to this matter, a preliminary or final plat subdividing Gallo and Dankers' tracts had not been approved by the Hearing Examiner.

In response to ¶ 14, (*See* Gallo and Dankers' Brief at 10 (paragraph 14)) *Compare*, CP 135-140 (Appellant Council's Declaration).

VI. ARGUMENT

A. Standard of Review

Review of a summary judgment decision on appeal is *de novo*, and the Court on review engages in the same inquiry as the trial court. *See Hayes v. City of Seattle*, 131 Wn.2d 706, 711, 934 P.2d 1179, *modified on other grounds*, 943 P.2d 265 (1997). Summary judgment should only be granted where "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." CR 56(c); *Harrington v. Pailthrop*, 67 Wn. App. 901, 905, 841 P.2d 1258, *review denied,* 121 Wn.2d 1018 (1992).

B. Reply to "Contract Theory" and "Rights in Application Reverted to Owners of Land upon Termination of Purchase and Sale Agreement"

This Court, on review, should not affirm summary judgment under a contract theory, because as discussed below: (1) there are genuine issues of fact related to Mangats' obligation to turn over the application or the application's vesting date; (2) as a matter of law it is not clear what the contract requires of the Mangats or favors their interpretation; and, (3) the policy arguments of which is less burdensome to assign ownership to landowners or applicants.

1. Genuine Issue of Fact Related to Mangats' Obligation to Turn over Application's Vesting Date

Gallo and Dankers' Brief infers that the issue of retaining rights in the application is disposed of, in part, by the following fact: "when [default] and [Mangats] were required under the contract to turn over to Dankers and Gallo all maps, drawings, studies, reports and other documents related to the subdivision of land [***]." Gallo and Dankers' Brief at 2 (Issue 1). *See* Gallo and Dankers' Brief at 11 (Gallo and Dankers' brief further incorporates Judge Leaches order at ¶¶ 4, 6 and 8). The County' mentions that Gallo and the Dankers' "contract theory of law" is also dispositive in this matter. *See* County's Response Brief at 3-4, FN 1. Despite the repeated assertion of the existence of a "contract theory" there is little in Respondents' Briefs to support how they prevail at summary judgment under the terms of the contract.[4]

This is because determining a contractual term's meaning involves questions of fact, e.g., an examination of objective manifestations of the parties' intent. *See Denny's Restaurants, Inc. v. Security Union Title Ins. Co.*, 71 Wn. App. 194, 201, 859 P.2d 619 (1993); *see also*, *Tanner Electric Coop. v. Puget Sound Power & Light*, 128 Wn.2d 656, 674, 911

[4] As discussed *supra.* § III A, it would be improper to raise such arguments for the first time on the cross appellant's reply, even though such concerns were raised below. *See* e.g., CP 466-467 ("The subdivision application could be considered 'one of the other written documents' which the Mangats were required to turn over to the sellers [***]")

P.2d 1301 (1996) ("The touchstone of contract interpretation is the parties' intent"); *c.f.*, *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990) (the court may declare the meaning of what is written, and parol evidence may be admitted to elucidate the meaning of the words employed).

The Mangats contend the addendum to the purchase and sale agreement did not require them to sign over the rights obtained through the application, only turn over documents, maps and work products so that Gallo and the Dankers could choose to prepare a new application; conversely Gallo and the Dankers appear to contend the terms include granting them all rights under the application including the application's vesting date. *Compare*, CP 120:3-17, 125-26, 1997; *and*, Appellants' Opening Brief at FN 1, 24-25; *with,* CP 98-100; *and*, Gallo and Dankers' Brief at 4.

The Mangats also argue that the order Hon. Judge Leach's order denying injunctive relief (at paragraph 8) does not interpret the meaning of the addendum terms in favor of Gallo and the Dankers' position, it merely identifies the verbatim terms: "[the Mangats] were required to turn over to Dankers and Gallo the maps, drawings, reports and other work product to the subdivision of land" (which the Mangats performed). *See* CP 562. The Mangats unequivocally disagree with the legal conclusion: "[t]here is

nothing left for them to own", because as the Mangats claim the application was still theirs. CP 562. Whether there is anything left for the Mangats to "own" is properly before this Court on appeal.

2. Contract Theory Not Entitled to Judgment as a Matter of Law

To the extent County and Gallo and the Dankers retell their contract theory argument, the appellate court should deny summary judgment and find the plain meaning of the terms does not require them to turn over any right not explicitly discussed by: "all studies, reports, letter, memorandums, maps, drawings and other written documents prepared by surveyors, engineers, biologists and other experts and consultants retained by the Buyers [***]." CP 648.

3. Reply to "Scrutinizing" and "Simplicity" Arguments

The County "urges" that the failure to hold vesting rights attach to a "completed application" ready to undergo the legislative process for obtaining a non-conforming use status runs with the land, would somehow require its agents to "scrutinize" or engage in frequent judicial contract interpretation. *See* County's Brief at 25. Similarly, Gallo and Dankers argue that holding applicants own the application rights to the exclusion of the landowner creates: "system difficult to administer and open to abuse." *See* Gallo and Dankers' Brief at 28.

But, there is no need for the County (in its municipal capacity) to interpret or interfere in a contract dispute, as it did here, if it follows the "sound policy" of processing a land use application for the applicant. *See* CP 419:8-421:12, 429:6-13, 430:6-17 (admission that PDS decided the issue by determining it ran with the land and therefore Gallo and Dankers could continue processing the application). Indeed, this function of government is generally reserved for the courts to resolve pursuant to the exercise of judicial power. Const. art. IV, § 1. The County's proposed policy of landowner ownership of the application leads to even more burdensome "scrutinizing" and interference inconsistent with the statute,[5] (i.e., examination of land ownership and contract interests ***at all times from pre-approval to final platting***) as opposed to the one time the subdivision statute plainly requires (i.e., at the final platting). *See* RCW 58.17.165.[6]

PDS is not in a position to decide ownership of anything; much less give private property away. *See Graham Neighborhood Ass'n v. F.G.*

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[5]Mangats do not dispute that the county may be able to add additional scrutiny and interference by enacting further ordinances, but has not done so here, as a review of the Snohomish County Code (SCC) would reveal. *But see*, *Adams v. Thurston County*, 70 Wn. App. 471, 855 P.2d 284 (1993) (adding contingent requirements for fully completed application would still violate intent of date certain requirement in statute).

[6] RCW 58.17.165 requires only: "a statement that the subdivision or short subdivision has been made with the free consent and in accordance with the desires of the owner or owners." RCW 58.17.165; *see also*, Mangats' Opening Brief at 21-23.

Assocs., 162 Wn. App. 98, 118, 252 P.3d 898 (2011). PDS's role is merely to collect information and recommend a decision to the Hearing Examiner.[7] While a land use application is being processed many complex situations may arise regarding the ownership of land, e.g., quiet title actions, foreclosures, adverse possession, tenants in common, joint tenants, multiple plats, etc..., which necessitate determinations outside of Snohomish County PDS's authority to decide. *See* CP 419:8-421:12, 429:6-13, 430:6-17; *State ex rel. Craven v. City of Tacoma*, 63 Wn.2d 23, 27, 385 P.2d 372 (1963) (Issuance of such a permit is not a matter of discretion but is ministerial); *see also*, *Norco Constr., Inc. v. King County*, 97 Wn.2d 680, 684, 649 P.2d 103, 106 (1982) (purpose of vested rights doctrine is to "avoid tactical maneuvering between [the] parties ...."); *see e.g.*, *Falaschi v. Yowell*, 24 Wn. App. 506, 508, FN 2, 601 P.2d 989 (1979) (illuminating problems arising from separate and distinct title to land); *c.f., Graham Neighborhood Ass'n,* 162 Wn. App. at 117-118; *Westway Constr., Inc. v. Benton County*, 136 Wn. App. 859, 866 (2006)

[7] PDS official Ed Caine admitted he decided Gallo and the Dankers could continue the application. CP 419:8-421:12, 429:6-13, 430:6-17; *see also*, CP 56:15-59:25. But Ed Caine was only in a position to administer the Snohomish County Code ([Ed Caine not aware of any policies regarding vesting] "what I have to do is look at the codes, and look at the polices [***] I don't think there is a code section") (CP at 426, 428-430) and statutes, which include: determining completeness, recommending the application for approval or denial, asking for additional information, or issuing notices of delay. *See generally*, SCC 30.70.

(owning property does not make party an applicant for purposes of Ch. 64.40 RCW damages).

If consumption of public resources and gearing of the public process to make a recommendation to the hearing examiner is the concern (*See* Gallo and Dankers Brief at 28), it is addressed by the application fees and expense of creating the proposal, which are the risks the applicant incurs. *See*, *West Main Associates v. Bellevue,* 106 Wn.2d 47, 50-51, 720 P.2d 782 (1986) ("while keeping options open normally involves a price, government can keep its options open at no cost to itself in the vesting game because virtually all the risk of loss is initially imposed on the developer.") (internal citations omitted).

In short reply to the contractor blackmail, scam and mischief policy argument (which cites to no facts in the record suggesting this is common) (Gallo and Dankers Brief at 28) this is already addressed, in part, by the County's distinction between applicant and the applicant's contact (e.g., a consultant like Ry McDuffy or Gene Miller). *See* SCC 30.70.040. Further, the potential for economic blackmail runs either way, including the contractor being deprived of consideration by the homeowner who does not want to pay for the contractor's services after expending time and effort on behalf of the homeowner. Finally, the

"economic blackmail" is resolved through action with the Court, not the administrative department who processes land use applications.

In sum, it is far easier and more appropriate for PDS to determine who submitted the application, i.e., there is less scrutiny needed when the County takes direction from the party who submitted the application and paid the application fee. Admittedly, the subdivision application process requires landowner consent before final platting (*see* RCW 58.17.165), but by design the applicant, not the County, ultimately bears the majority of the risks of not having the landowners' consent. *See West Main Associates v. Bellevue*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986) ("government can keep its options open at no cost to itself in the vesting game because ***virtually all the risk of loss is initially imposed on the developer***.") While it could be argued that Mangats gambled and lost on the initial risk, it was PDS's interference (Ed Caine's declaring the landowners to be the applicants) that is the primary complaint in the present appeal.

C. Applicants Have Certain and Exclusive Rights To An Unapproved Subdivision Application Even After They Lose Interest In The Land To Be Subdivided.

1. Respondents Seek To Extend "In Rem" Doctrine to Circumstances Where A Land Use Permit Has Not Been Issued

In order to characterize an action as *in rem* or *in personam*, the court must "look behind the form of the action to the gravamen of

complaint and the nature of the right sued on." *State Eng'r v. S. Fork Band of the Te-Moak Tribe of W. Shoshone Indians of Nev.*, 339 F.3d 804, 810 (9th Cir. 2003). The County argues that:

> Appellants do not dispute the well established rule of law that a land use application, ***once it has ripened into a permit*** being issued, ***creates*** vested rights in real property 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 land use application as the permittee.

County's Response Brief at 14 (emphasis supplied). There is little dispute between the parties about who is, or which property enjoys a right after a land use permit issues (e.g., a plat of proposed subdivisions, by the legislative body of the city, town or county). The dispute is over what happens before issuance of a permit *See* RCW 58.17.070-.170 (preliminary plat legislative approval to final plat legislative approval).

Citation to *Clark*, and other cases, such as: *Northwest Land and Investment, Inc.,* and extra-jurisdictional authority, is a misguided attempt to bolster Landowners' and County's position with inapplicable authority because each and every case cited deals with an issued permit. *See e.g., Clark v. Sunset Hills Memorial Park*, 45 Wn.2d 180, 183, 273 P.2d 645 (1954) (Washington case concerning rights to a county commissioners granted permit allowing the property to be used for a cemetery) (emphasis supplied); *Northwest Land and Investment, Inc. v. City of Bellingham*, 31

Wn. App. 742, 743, 644 P.2d 740 (1982) (Washington case concerning rights to preliminary plat of Edgemont Heights which had been approved with conditions by the City Council of Bellingham) (emphasis supplied); *see also,* Gallo and Dankers' Brief at 21.[8] None of the cases cited by the County or Gallo and Dankers stand for a "rule of law" that an unapproved land use application runs with the land. *See* County's Response Brief at 17. For example, for Gallo and Dankers to say *Anza Parking Corp.* is "nearly identical" to this case ignores the material fact that the Conditional Use Permit for the parking facility had been issued by the City of Burlingame before it ran with the land. *Anza Parking Corp.*, 195 Cal. App.3d at 858-859.

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[8] Further examples cited in Respondents' Briefs include (emphasis supplied to show the subject matter was a permit that was granted, issued or approved by legislative body): *Upper Minnetonka Yacht Club v. City of Shorewood*, 770 N.W.2d 184, 187 (Minn. 2009) (Minnesota case concerning right to a conditional use permit issued by City of Shorewood); *Michael Weinman Associates General Partnership v. Town of Huntersville*, 147 N.C. App. 231, 232, 555 S.E. 2d. 342, 344 (N.C. App. 2001) (Town of Huntersville re-zoned the commercial site); *Faircloth v. Lyles*, 592 So.2d 941, 943 (1991) ("The classification of property for zoning purposes is a legislative rather than a judicial matter" and where the Hinds County Board of Supervisors approved the rezoning petition); *Anza Parking Corp. v. City of Burlingame*, 195 Cal. App.3d 855, 858-859 (1987) (California case concerning ownership of conditional use permit granted by the City of Burlingame for a parking facility); *Matter of Lefrack Forest Hills Corp. v. Galvin*, 40 A.D.2d 211, 338 N.Y.S. 2d 932 (1972) (concerning ownership of municipality issued building permits); *State ex. Rel. Parker v. Konopka*, 119 Ohio App. 513, 515, 200 N.E.2d 695 (1963) (successor land owners right to government issued variance); *Holthaus v. Zoning Board of Appeals of Town of Kent*, 209 A.D.2d 698, 698, 619 N.Y.S. 2d 160 (N.Y. App. Div. 1994) (temporary variance is issued to a prior owner); *Clements v. Steinhauer*, 15 A.D.2d 72, 76, 221 N.Y.S.2d 793 (1961) (concerning an issued use permit); *Guenther v. Zoning Board of Review of the City of Warwick*, 85 R.I. 37, 39-40, 125 A.2d 214 (1956) (owner-applicant applied to and was granted an exception or variation to use said premises as a convalescent home); *O'Connor v. City of Moscow*, 69 Idaho 37, 43, 202 P.2d 401 (1949) (existing non-conforming use).

Conversely, the Mangats may cite each and every case, including *Clark* (45 Wn.2d at 183) and *Anza Parking* (*supra.*) for the proposition that in every known case where the land (and its owners) enjoy a new right to a non-conforming use, the municipality's approval of the permit was a condition precedent. *See* FN 4, *supra.*

2. County Ignores Due Process Foundation for the "Date Certain" Rule

The County cites to the *Mission Springs* decision at 962 and *West Main Associates* at 50 to argue Mangats are asking for a "contrary" proposition that "[vested rights] is a fundamental component of the constitutionally cognizable right to use and enjoyment of land." *See* Response Brief at 18-19 (*citing*, *Mission Springs v. City of Spokane*, 134 Wn.2d 947, 962, 954 P.2d 250 (1998); *West Main Associates*, 106 Wn.2d at 50). Not so, due process owed to an applicant is not a "contrary" proposition to "use and enjoyment" of a landowner where the application has been approved and the permit issued. *See Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 891, 976 P.2d 1279 (1999); *Valley View Indus. Park v. Redmond*, 107 Wn.2d 621, 636, 733 P.2d 182 (1987); *Hull v. Hunt*, 53 Wn.2d 125, 130, 331 P.2d 856 (1958); Frederick D. Huebner, WASHINGTON'S ZONING VESTED RIGHTS DOCTRINE, 57 Wash L. Rev. 139,

n.11 (1981). *Mission Springs* states in the paragraph immediately following the County's citation:

> Moreover, ***procedural rights respecting permit issuance create property rights when they impose significant substantive restrictions on decision making***. *Bateson v. Geisse*, 857 F.2d 1300, 1304-05 (9th Cir. 1988) ("[A] statutory scheme which placed 'significant substantive restrictions' on the decision to grant a permit or license would be sufficient to confer due process rights."); *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994) (Procedural permitting requirements may transform a unilateral expectation into a property interest "'if the procedural requirements are intended to be a 'significant substantive restriction' on . . . decision making.'") (quoting *Goodisman v. Lytle*, 724 F.2d 818, 820 (9th Cir. 1984)); *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983) (same); *Jacobson v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980) (property interest is created where discretion to deny the permit or license is limited).

Mission Springs, 134 Wn.2d at 962 (emphasis supplied).[9]

The County essentially argues that the vested right exclusively "emanates from the fundamental constitutional right of an individual to utilize his own land as he sees fit." *See* County's Response Brief at 18-19. The foundation of vested rights in Washington is not derived solely from a property owner's rights; but also the due process concerns of the applicant,

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[9] In *Mission Springs*, the court explained that a due process violation may be premised on improper deprivation of a "state-created property right" and that "property interests are not created by the constitution but are reasonable expectations of entitlement derived from independent sources such as state law." *Mission Springs*, 134 Wn.2d at 947, 962. The court then found that a city violated due process guarantees by flouting the vested rights doctrine and a local grading code. *Id.* 134 Wn.2d at 962, n.15.

as well as, fundamental fairness and takings limitations of governmental power. *See Hull*, 53 Wn.2d at 130; *see generally*, *West Main Assocs.* at 50-51; *c.f.*, Roger D. Wynne, WASHINGTON'S VESTED RIGHTS DOCTRINE: HOW WE HAVE MUDDLED A SIMPLE CONCEPT AND HOW WE CAN RECLAIM IT, 24 Seattle Univ. L. R. 851, 885-886, 888, 936-937, FN 351 (Winter 2001) ("To find a violation of due process in land use permitting, a court need only determine that the local jurisdiction ***improperly interfered*** with land use permitting procedures. Land use permitting procedures are shaped by statute and by local law" and noted commentator Richard Settle observes that "the legal basis for Washington's vested rights doctrine never has been articulated."). *West Main* also states:

> **The Washington doctrine protects developers who file** a building permit application that (1) is sufficiently complete, (2) complies with existing zoning ordinances and building codes, and (3) is filed during the effective period of the zoning ordinances under which the developer seeks to develop. *See, e.g.*, *Allenbach v. Tukwila*, 101 Wn.2d 193, 676 P.2d 473 (1984). Once a developer complies with these requirements a city cannot frustrate the development by enacting new zoning regulations.
> The purpose of the vesting doctrine is to allow developers to determine, or "fix," the rules that will govern their land development. *See* Comment, WASHINGTON'S ZONING VESTED RIGHTS DOCTRINE, 57 Wash. L. Rev. 139, 147-50 (1981). The doctrine is supported by notions of fundamental fairness. As James Madison stressed, citizens should be protected from the "fluctuating policy" of the legislature. The Federalist No. 44, at 301 (J. Madison) (J.

> Cooke ed. 1961). **Persons should be able to plan their conduct with reasonable certainty of the legal consequences.** Hochman, THE SUPREME COURT AND THE CONSTITUTIONALITY OF RETROACTIVE LEGISLATION, 73 Harv. L. Rev. 692 (1960). Society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.
>
> > Of course, all institutions, including government, like to keep options open. ***But while keeping options open normally involves a price, government can keep its options open at no cost to itself in the vesting game because virtually all the risk of loss is initially imposed on the developer.*** Unfortunately, that loss is still a social cost, ultimately borne by all, whether or not government recognizes it. (Footnote omitted.)
>
> Hagman, THE VESTING ISSUE: THE RIGHTS OF FETAL DEVELOPMENT VIS A VIS THE ABORTIONS OF PUBLIC WHIMSY, 7 Envtl. L. 519, 533-34 (1977).

West Main Assocs., 106 Wn.2d at 50-51 (emphasis supplied). In looking behind the vested rights doctrine, incorporated into the subdivision statute, the process is divided into two steps:

First, the Washington's "date certain" protects developers who file, e.g., a building permit application that is: (1) sufficiently complete, (2) complies with existing zoning ordinances and building codes, and (3) is filed during the effective period of the zoning ordinances under which the developer seeks to develop. *See, e.g., Allenbach,* 101 Wn.2d 193; *see also, Graham Neighborhood Ass'n*, 162 Wn. App. at 118; County's Response

Brief at 22. Mangats argue that Washington's date certain rule, a necessary component of vested rights, is founded in due process, takings, fundamental fairness, and the constitutionally cognizable right to use and enjoy expectation interest. *See Hull v. Hunt*, 53 Wn.2d at 130. Further, the Mangats, at the time of application, had a reasonable expectation to acquire the property as contract option purchasers. The Mangats also had an expectation the County would act according to its codified process and procedures. The class of persons being protected, i.e., applicant/developer, is consistent with RCW 58.17.033, the Land Project Review Act and Snohomish County Code, as it is only speculative at this stage that the County legislative body will ultimately approve the project; the applicant/developer expends the costs (application fees), and bears the ultimate risk of non-approval. *See* Mangats' Opening Brief at 17-23. Under a social contract theory, the applicant has paid their feeds for a date certain and certain processing of their application.

While the first step sets a date certain upon which the application must be processed and considered, this step does not "fix" those rights to land. Such requires (and always requires for the creation of an undesirable non-conforming use) the second step: approval by legislative body (issuance of the permit or approval of the plat). *West Main Associates*, 106 Wn.2d at 50; *see also*, *Graham Neighborhood Ass'n*, 162 Wn. App. at

118. The legislature deemed fit in a subdivision that before such rights are attached, fixed, finalized, etc. on land, the applicant must provide: a "full and correct description of the lands divided [*** and a] statement that the subdivision or short subdivision has been made with the free consent and in accordance with the desires of the owner or owners." *See* RCW 58.17.165.[10] Mangats argue these statutory requirements, not the date certain, but rather attachment of rights, are founded in different policies and constitutional values: due process, takings, and the right to use and enjoyment of land. *See e.g.*, *Hull v. Hunt*, 53 Wn.2d at 130-131.

Here, the permit had not been issued, i.e., the second step to attach had not occurred. Again, this is important because the County's Response Brief (at 14-17) citing to a "rule of law" "widely recognized" and only applied to cases where a permit was already issued by a legislative body. *See e.g., Clark*, 45 Wn.2d at 183. Similarly, Gallo and Dankers argument that the Mangats cannot cite "a single case" to support their position (*See* Gallo and Dankers' Brief at 18, 21) the same can be said of Gallo and Dankers' position that an unapproved application runs with the land. (*See* Gallo and Dankers' Brief at 21). In other words, authority cited by the

[10] This is consistent with other in rem or running with the land actions. *See* Mangats' Opening Brief at 26-28.

County and Landowners do not apply to instances where a permit had not been issued.

3. Landowner Permission Not A Requirement to Proposing Subdivision

The landowner's brief argues:

> Appellants must acknowledge that prior to entering into written agreements with the Dankers' and Mr. Gallo they had no standing to apply for the subdivision of the Dankers' and Mr. Gallos' Property. It is axiomatic that one cannot subdivide land one does not own.

Gallo and Dankers' Brief at 11 (without landowner's permission, a party has no standing to propose a subdivision of land). Mangats make no such acknowledgement, under RCW 58.17.033(1), (3), Landowner approval is not a condition precedent to proposing a division of land. *See* RCW 58.17.033(1), (3); *see also*, Appellants' Opening Brief at 16, 21-23. Under RCW 58.17.033 (2) the requirements for a fully completed application shall be defined by local ordinance. Under the Snohomish County Code, SCC 30.70.040, completeness determination is owed to the applicant or their designee, and no other; therein states, in part:

> (1) The department shall determine whether a project permit application is complete or incomplete within 28 days after receiving an application. The determination shall be in writing and mailed, faxed, e-mailed, or delivered to ***the applicant or the applicant's representative*** within the required time period, except as set forth in SCC 30.70.040(2). When an application is determined

> incomplete, the determination shall state what is necessary to make the application complete.
>
> (2) An application is complete for the purposes of this section if the ***department does not provide a written determination to <u>the applicant</u>*** within the required time period. [***]

SCC 30.70.040(1), (2); *see also*, SCC 30.70.040(5) (emphasis supplied). Gallo and Dankers seek to extend and allow landowners to also "own" the entire subdivision process, is authorized by RCW 58.17.165. This is an attempt to connect landowner consent at final plat with standing to file an application at the beginning of the process.

But landowner consent is not a condition precedent to applying for a proposed division of land (*See* RCW 58.17.033) or even obtaining preliminary approval (RCW 58.17.070); but only a condition precedent to filing the "final" or "short plat" for record (RCW 58.17.165). Gallo and Dankers analysis of the *Halverson* case, which applies the statutory language in RCW 58.17.165, is another misguided attempt to show the Mangats' understood they needed the landowners consent to start their proposal, when it is only required for the land, thru filing of the plat, to enjoy lasting and permanent benefit of an approved permit. *See Halverson v. Bellevue*, 41 Wn. App. 457, 461, 704 P.2d 1232 (1985). *Halverson* voided the filing of the permit in the land records thru quiet title, not the proposal to subdivide. *Id.* at 458. *Halverson* stands for one of the many

risks involved in proposing a subdivision and has little to do with the connection between the applicant and their application. *Id.* at 461. If having an interest in the subdivision or permission of the landowner is not dispositive to maintaining a right to direct the application, then logically loosing such an interest would also not be material.

Further, there is nothing special or new about an applicant being owed due process in their application. Here, the application was determined to be complete after submittal. CP 219. Further the application was signed only by the Mangats. CP 410, 481. The Mangat's application says nothing about the terms of purchase and sale agreement, or having the signature of the underlying landowners (CP 29-30, 410, 481[11]) nor is having permission a requirement to submit a proposal. *See* SCC 30.70.010-.140; *see also*, Appellant's Opening Brief at 22-23. The Mangats expended all the initial resources and incurred all the initial risks for the application. CP 142. Gallo and Dankers only to incurred their $18,000 (Ry McDuffy's costs and expenses) after having obtained Ed Caine's unlawful permission to continue the application. CP 679-682. The argument that the land was tied up in the process of seeking a permit goes

[11] In depositions of Ed Caine and Tom Rowe, states that it informally wants to see some interest in the land or landowner consent before accepting an application or recommending approval but notes nothing has codified this requirement until final platting. Further the Mangats' application was deemed complete by operation of law.

only to the contract dispute between landowners and contract option purchasers.

4. Statute is derived from Common Law in *Hull v. Hunt.*

Gallo and Dankers argue that common law vesting cases are inapplicable to subdivisions. But, it is well recognized that the legislature intended to codify (not replace) common law vesting rules in applying them to subdivisions. *See* RCW 58.17.033; *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 976 P.2d 1279 (1999); *see also*, *Abbey Rd. Group, LLC v. City of Bonney Lake*, 141 Wn. App. 184, 194, 167 P.3d 1213 (2007).

The Common Law Vesting case of *Hull v. Hunt* is instructive because it announced the date certain rule incorporated into the statute, and the policy basis behind it; i.e., that certainty in process trumps even concerns of permit speculation (lack of good faith expectation); therein:

> 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 (one hundred and eighty days under the city of Seattle building code § 302 (h)).

Hull v. Hunt, 53 Wn.2d 125, 130, 331 P.2d 856 (1958) (because the preparation costs associated with obtaining permit approval and the time limits for completing construction leads to a general "good faith expectation" title will be acquired). Our Supreme Court arrived at the date certain rule after considering and rejecting the "change in position" rule of other jurisdictions in favor of Washington's rule. *Id.* at 129-130 ("The more practical rule to administer, we feel, is that the right vests when the party, property owner or not, applies for his building permit, if that permit is thereafter issued").

Further, here it cannot be said there is even permit speculation in this case because the Mangats had a good faith expectation of acquiring property at the time of submittal of the proposal (i.e., as contract purchasers), and paid for the processing of the permit. When they desired to discontinue their application, Mr. Caine interfered by deciding the application was in rem. This was done after Mr. Gallo expressed his desire to continue the application and after the County decided, without passing any ordinances, that land use applications also belong to the landowners. If Gallo and the Dankers had an expectation that the application was theirs, or the Mangats were not complying with the terms of the contract,

then they could have initiated a lawsuit to compel performance. But they did not because the terms of the contract are ambiguous.

5. Distinguishing Plat Proposal from Platting.

Landowners argue: there "is simply no basis for the appellant's theory that an application for a subdivision of land begins as an *in personam* proceeding [***]" and such is "fabricate out of while cloth" Gallo and Dankers' Brief at 25, 27. Further Gallo and Dankers argue "appellants do not cite a single case or legal authority to support their position." Gallo and Dankers' Brief at 21. But Gallo and Dankers conceded that Mangats' offer analysis of the subdivision statute to support their position.

Further, Mangats Opening Brief states Washington authority where notice, approval and/or attachment are necessary before the land uses and enjoys the right. *See* Appellants Opening Brief at 26-27 (Conditions for covenants to run with land, conditions running with land, forfeiture in rem). In subdivisions, attachment occurs at preliminary and final plat approvals where the legislative body (not the processing administrator) issues the preliminary and final plat. RCW 58.17.070, .165, .170. This is imposed at public hearing, with notice and careful deliberation and consideration of the public interest, depending on the type of land use decision being made. *See* RCW 58.17.070, .165, .170; SCC Ch. 30.70. to

SCC Ch. 30.74. Landowners do not dispute that at all times material to this matter, no such approval was given and no attachment occurred.

D. Reply to County's Argument that "Vested Rights can only be exercised by one who acquires title or a right to possession in real property" (County's Brief at 21-23) and "Mangats Cannot Assert Deprivation of a Property Interest in a Land Use Application Affecting Property in Which Claimant Has No Interest" (County's Brief at 26-28)

The County divides its argument into two sections, but they are better analyzed together as these are the heart of the County's flawed argument. In essence, that argument is that rights derived from a land use application are somehow "inextricably linked" to the land. *See* County's Brief at 21-23[12] (the nature of vested rights is that they "vest" in the real property); County's Brief at 27-28. The County's argument is flawed because: (1) the right only attaches to land upon issuance of the permit; (2) prior to such issuance the rights belongs to the applicant; and, (3) such rights are valuable expectations which the County took by declaring Gallo and the Dankers the applicants.[13]

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[12] The County misrepresents the finding in *Hull v. Hunt*. *Hull* does not say, in note or otherwise, that the rights created can only be exercised by one having title or possession of the property. Instead, *Hull v. Hunt*, 53 Wn.2d at 130-31, states: "we feel, is that the right vests when the party, property owner or not, applies for his building permit, if that permit is thereafter issued". Mangats argue throughout their opening brief and herein, this means the rights belong to the applicant, property owner or not, and then belong to the land after the permit is issued through governmental action.

[13] The only other result, depending on the date of the County's interference, would be such rights expired by operation of the Snohomish Code. *See* Mangats' Opening Brief at 33-36.

1. The Right Only Attaches To Land upon Issuance of the Permit

First, the County is misguided by its reliance upon authority where the permit was granted (or e.g., exercised, issued, attached, created, perfected, fixed, etc...) (*see* FN 5, *supra.*). Such authority is utilized without regard to the fact in this case that the permit had not issued. It is disputable that non-conforming conditions run with the land simply because an application is filed. *See Graham Neighborhood Ass'n*, 162 Wn. App. at 117-118. Such a strategy would not serve the policies of avoiding tactical maneuvering between the parties, that a date certain rule creates. *See supra*; *Norco Constr.*, 97 Wn. 2d at 684; *Allenbach*, 101 Wn.2d 193.

A tract or parcel of land does not enjoy the right to be (generally or specifically) divided into lots, blocks, streets and alleys, site plans, or other divisions and dedications until approval by legislative body. *See* RCW 58.17.035-.170; *see also*, RCW 58.17.020(2) and (4) (definitions of plat and preliminary plat, which illuminates the difference between general or preliminary plat and a specific final plat). Mangats further incorporate their arguments in their Opening Brief. *See* Mangats' Opening Brief at 21-23.

For the reasons stated above, the Court should reverse the Court below and deny Summary Judgment in favor of the County and Gallo and

the Dankers because, as a matter of law: the property owner could not derive the right to the application from ownership of land where no permit had been approved by the legislative body under the process described in RCW 58.17.035-.170.

2. Prior to Permit Issuance, Vested Right Belongs Exclusively To the Applicant, As Contemplated By the Statute, And As the Party by Whom Processing Costs and Fees Are Incurred

Land does not pay application fees, make submittals or take risks for approval or denial. Here, the Mangats incurred the costs and fees associated with proposing the subdivision, and admittedly bear the risk of such action. Further, as acknowledged by the County, the literal meaning of the Statute bestows this right upon the applicant. The authority upon which a municipality grants non-conforming uses is derived ultimately from the people, not from their lands. Const. art. I, § 1. Here the gravamen is not the granted right to divide the land, but a proposal, which enjoys the right to be considered under the laws in effect at which it was made. *See* RCW 58.17.033*; S. Fork Band of the Te-Moak Tribe of W. Shoshone Indians of Nev.*, 339 F.3d at 810.

This Court should reverse the Court below and deny Summary Judgment in favor of the County and Gallo and the Dankers because, as a matter of law: the Mangats exclusively enjoy the right to direct, terminate, transfer and exclude others from taking to obtain a non-conforming

subdivision should they comply with the second step (described above) for obtaining the permit.

3. Such Rights Are Valuable Rights, Which the County Took By Declaring Gallo and the Dankers the Applicants

The County relies on certain language in: *Vashon Island v. Washington State Boundary Review Bd.*, 127 Wn.2d 759, 903 P.2d 953 (1995) (citing *In Re F.D. Processing, Inc.*, 119 Wn.2d 452, 463, 832 P.2d 1303 (1992)).

The application (i.e., subdivision proposal) is to be considered under the laws in effect at the time of completion. RCW 58.17.033. Having a land use application enjoy certainty is in and of itself a valuable interest because the applicant, or their successor or assign, can take the right to approval and obtain a non-conforming use, provided they do so within the limitations of the statute and County ordinances. *See e.g.*, SCC 30.70.140 (limitations of expiration of application); SCC 30.70.110(3)(b) (substantial revision by applicant). It makes little sense that the County can cause such a proposal, made and paid for by one party, and declare it be enjoyed by another party, and at the expense of the public interest, without fairly compensating the first party for the expense and effort in making such a proposal.

In addition to arguments that such a right is intangible property (*see* Mangats' Opening Brief at 31), a property interest may be created if "procedural" requirements are intended to operate as a significant substantive restriction on the basis for an agency's actions. *See Mission Springs*, 134 Wn.2d at 962. Further, the Mangats have procedural rights in transferring or ending this right, which is comprised of valuable, albeit, temporally limited rights (limited by expiration, or a decision to issue the permit). *See* Mangats' Opening Brief at 20-23. The rights (power) to consume, destroy or alienate the thing (sticks in the bundle) are recognized by noted commentators as indicia of ownership. *See* A.M. Honore, OWNERSHIP, in Oxford Essays in Jurisprudence 107 (A/G/ Guest ed. 1961). Here, Mangats had the right to allow the application to expire, before Ed Caine intervened. *See* CP 420-421. At Ed Caine's deposition he admits to interference:

> Q. Would you have withdrawn it [the application] if they sent it to you in writing?
>
> A. I could have.
>
> Q. Even after Dankers had told you he wanted to continue on?
>
> A. No, sir.
>
> Q. You seem to be following some sort of structure or law here, and I'm trying to figure out where you got it from.

> A. As long as the applicant is not challenged or the contract is not challenged, then if I received a request to withdraw the application [***].

CP 420-421. Ed Caine's intervention is predicated on the incompatible interests between landowner and applicant. *See e.g.,* Ch. 2.08 RCW (Superior Court Original Jurisdiction); RCW 7.24.010 (Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed). Even if the issuance of the permit is speculative, the County determination deprived the Mangats of the ability to request extensions, alienate or transfer control to another party or destroy their proposal.

E. Reply to Alternative Grounds for Summary Judgment on Injunctive Relief (Gallo and Dankers Brief at 30-39).

Gallo and Dankers' Brief offers "three alternative grounds[:]" (1) Laches, (2) No Hardship and (3) Election of Remedies for granting summary judgment for Gallo and Dankers. In reply, this section contains no argument concerning Mangats' other claims or relief (e.g., declaratory relief).

As the Supreme Court explained, protecting "developers" through the vested rights doctrine comes at a cost to the public interest because the practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use which is fundamentally against the public

interest. *See Noble Manor v. Pierce County*, 133 Wn.2d 269, 275, 943 P.2d 1378 (1997); *Erickson & Associates v. Danz*, 123 Wn.2d 864, 873-84, 872 P.2d 1090 (1994). A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws; if a vested right is too easily granted, the public interest is subverted. *See Erickson*, 123 Wn.2d at 873-74.

Mangats primary position is that the County took their rights to the application and transferred them to Gallo and Dankers constituting a private taking without just compensation. Appellants Opening Brief at 28-33. The Mangats sought injunctive relief to halt the processing of the permit and adjudicate the rights of the parties. Further to the extent the County's action in processing Trombley Heights after December 16, 2009, is found to be something other than a taking, such as: (1) a new application with earlier vesting date; (2) an expired application revived by Ed Caine's action; (*See generally*, Mangats' Opening Brief at 28-36) or (3) failure to take direction from the proper party, then such action should be enjoined because Mangats, like other members of the public in Snohomish County, have an interest seeing the land use laws take effect. *See Noble Manor*, 133 Wn.2d at 275; *c.f., Graham Neighborhood Ass'n,* 162 Wn. App. at 118. The public is aggrieved by granting a

nonconforming use outside the limited scope of the subdivision statute and common law.

VII. CONCLUSION

For the foregoing reasons, this Court should reverse the Trial Court's granting of Snohomish County and Gallo and the Dankers' Motions for Summary Judgment, and grant the Mangats' Motion for Summary Judgment. Further, this Court should deny Gallo and Dankers' objection to Mangats' assignments of error, and not allow review of additional arguments made by Gallo and Dankers with respect to a contract theory.

DATED this 21 day of May, 2012 at Arlington Washington.

Respectfully Submitted,

STAFNE LAW FIRM

Andrew J. Krawczyk, WSBA 42982
239 N. Olympic Ave.
Arlington, WA 98223
Phone: (360) 403-8700 x 207
Fax: (360) 386-4005

ORIGINAL

No. 67712-8-I

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

KHUSHDEV MANGAT, et ux.,
Appellants

vs.

SNOHOMISH COUNTY, et. al.,
Respondents/Appellees

DECLARATION OF SERVICE

I, Chessa Tachiki, declare under the penalty of perjury that I caused to be served a copy of Plaintiff/Appellant's Consolidated Reply to Brief of Respondents/Cross Appellants Johannes Dankers, Martha Dankers and Luigi Gallo and Reply to Respondent Snohomish County's Response Brief on Appellees' attorneys by giving a true and correct copy of said document to a legal messenger for delivery to the following individuals:

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Kenneth H. Davidson
Davidson, Czeisler & Kilpatric, P.S.
520 Kirkland Way, Suite 520
P.O. Box 817
Kirkland, WA 98083

Brian Dorsey
Snohomish County Deputy
Prosecuting Attorney
Admin East 8th Floor, M/S 504
3000 Rockefeller Avenue
Everett, WA 98201-4060

DATED this 21 day of May, 2012 at Arlington, Washington.

Chessa Tachiki, Paralegal
Stafne Law Firm