67712-8

67712-8

Case No. 67712-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KHUSHDEV MANGAT and HARBHJAN MANGAT,

Appellants

vs.

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

Respondents

SNOHOMISH COUNTY'S RESPONSE BRIEF

MARK K. ROE
Snohomish County Prosecuting Attorney

Brian J. Dorsey, WSBA #18639
Deputy Prosecuting Attorney
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Avenue
Everett, Washington 98201-4046
(425)388-6393 Fax: (425)388-6333
bdorsey@snoco.org

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Washington Cases: **Page(s)**

Other Cases:

Constitutional Provisions:

Statutes:

Court Rules:

Other Citations:

I. INTRODUCTION

This action was commenced as a complaint for Declaratory relief seeking a determination of the rights of the parties under an application for preliminary subdivision approval filed by Plaintiffs/Appellants, Khushdev Mangat and Harbhajan Mangat ("Mangats"), as contract purchasers of certain real property owned by Defendants/Respondents, Luigi Gallo and Johannes and Martha Dankers ("Gallo and Dankers"). (CP 796-802). Specifically, the Mangats sought to enjoin Snohomish County ("County") from continuing to process the subdivision application at the request of the underlying property owners, Gallo and Dankers, once the Mangats option to purchase the real property terminated, stating their position as follows:

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

(CP 798, ¶ 3.14).

Upon cross-motions for summary judgment the issue was stated by Superior Court Judge David A. Kurtz as follows:

> [A]re the vested rights from the application in rem or in personam? Or in other words, do they run with the land or are they personal to the plaintiffs?

(VRP, pg. 30, Lines 2-5). In issuing his ruling granting the Defendants/ Respondents' motions for summary judgment, Judge Kurtz quoted from a previous ruling by Court of Appeals Judge Robert Leach, serving as Judge Pro Tem of the Snohomish County Superior Court, denying Plaintiffs' motion for preliminary injunction, concluding as follows:

> 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 legal right to develop the property.

(VRP pg. 30, lines 13-19; quoting Order Denying Motion for Preliminary Injunction dated May 16, 2011, CP 562, ¶ 6).

Based on the foregoing reasoning, Judge Kurtz concluded as follows:

> [T]he Court after due deliberation is persuaded that the weight of authority and logic is that the vested rights from the application do run with the land. The rights are tied to the real property, and in this Court's view it makes little sense if the interests are somehow separated and divorced from the land.

(VRP pg. 31, Lines 12-17). Accordingly, Judge Kurtz entered an order granting the motions for summary judgment of the County and Defendants Gallo and Dankers dismissing the Mangats complaint with prejudice and

denying the Mangats' cross-motion for summary judgment. (CP 9-12).[1] For the reasons set forth herein, the County requests this court to affirm the decision of the trial court granting summary judgment.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Two alternative motions for summary judgment were presented by the County and Defendants Gallo and Dankers respectively. The County's motion was predicated on the argument that the vested rights attaching under a land use application are in the nature of an "in rem" property right which attaches to and runs with the land as a matter of law and, thus, that Defendants Gallo and Dankers were entitled to continue processing the subdivision application as the underlying property owners after the Mangats ceased having any further interest in the real property which was the subject of the application. (CP 478-495). The motion of Defendants Gallo and Dankers included a contract theory of law and argued that the terms of the purchase and sale agreement between the parties contained an express assignment by the Mangats of all rights in the subdivision application and related documents by the Mangats to Defendants Gallo

[1] In addition to the issue of law raised in the County's motion for summary judgment Defendants/Respondents Gallo and Dankers asserted as an alternative argument a contract based theory contending that to the extent the Mangats retained any interest in the subdivision application, such interest was conveyed by contract to Defendants Gallo and Dankers under the terms of the purchase and sale agreement. (See Defendants' Dankers and Gallo Motion for Summary Judgment, CP 455-477). The court granted both motions for summary judgment and, thus, the decision may be affirmed on either grounds. (CP 9-12).

and Dankers in the event the Mangats were unable to close the purchase and sale and, thus, that as a matter of contract Defendants Gallo and Dankers were entitled to continue processing the application. (CP 455-477; 101-03).

The trial court granted both motions for summary judgment, each of which was individually dispositive of the Mangats complaint in this matter. (CP 9-12). Accordingly, the issues relating to the Mangats' assignments of error as it pertains to the trial court's granting of the foregoing motions for summary judgment may be stated as follows:

1. Did the trial court err in concluding, as a matter of law, that the vested rights arising under a land use application are in the nature of an "in rem" property right which attach to and run with the land such that the application may be processed by the underlying land owner in the event the named applicant ceases to have any further interest in the real property?

2. Did the trial court err in concluding, as a matter of law, that the terms of the real estate purchase and sale agreement as between the Mangats and defendants Gallo and Dankers contained an express assignment of all rights which may otherwise have been retained by the Mangats in the subdivision application and related documents to defendants Gallo and Dankers upon termination of the purchase and sale agreement?

In addition to the above, the Mangats assign error to the trial court's denial of Plaintiffs' cross-motion for summary judgment which was predicated on the argument that the vested rights arising under the

subdivision application constituted the personal property of the Mangats and, thus, that the County effected an "unconstitutional taking" of the Mangats' property interest in the application by allowing Defendants Gallo and Dankers to continue processing the subdivision application. (CP 221-235). In this regard, the issue relating to the Mangats' assignment of error as it pertains to the trial court's denial of the Mangats' cross-motion for summary judgment may be stated as follows:

> 3. Did the trial court err in concluding, as a matter of law, that where a subdivision application is filed by a contract purchaser whose option to purchase the subject property is subsequently terminated, such person retains no right or interest in the subdivision application for purposes of a claim of deprivation of a property interest?

The County incorporates by reference and joins in the Statement of Issues set forth in the Brief of Respondent Johannes Dankers, Martha Dankers and Luigi Gallo filed concurrently herewith as it pertains to those alternative grounds upon which this court may affirm the trial court's grant of summary judgment set forth at pg. 3 of said Brief of Respondent.

III. STATEMENT OF THE CASE

Defendants/Respondents Luigi Gallo and Johannes Dankers and Martha Dankers, husband and wife, own adjoining parcels of real property situated in unincorporated Snohomish County. (CP 629, ¶ 1). In March 2007, Mr. Gallo and the Dankers entered into combined Real Estate

Purchase and Sale Agreements with Plaintiffs/Appellants, Khushdev Mangat and Harbhajan Mangat, for the sale of the subject properties. (CP 630, ¶ 2).

Khushdev Mangat himself is a licensed real estate agent and represented the Mangats as the selling agent. (CP 642). An Addendum to the Purchase and Sale Agreement provided that the Mangats were to submit a subdivision application for development of the property following expiration of a feasibility contingency, and required Mr. Gallo and the 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, ¶ 1(c)).

In accordance with the above, the Mangats proceeded to submit a "Master Permit Application" to Snohomish County on September 24, 2007, for a 29-lot rural cluster subdivision affecting the subject property to be known as Trombley Heights (hereinafter "Application"). (CP 692-695). As reflected on the face of the Application, the County requires the owner of the real property to be identified on the application and consent to a subdivision application where the application is submitted by a third-party. (CP 692-95). This is also required by State law. See RCW 58.17.165 (stating; "Every final plat or short plat of a subdivision or short subdivision filed for record must contain 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***.")

The Application was deemed complete for purposes of "vesting" effective as of the date of filing. (CP 698). During the pendency of the subdivision application the Mangats were unable to secure a loan for purposes of closing the purchase of the properties and the Purchase and Sale Agreements expired by their own terms effective December 16, 2009. (CP 631-32, ¶ 7). Thereafter, by letter dated May 10, 2010, Mr. Gallo and the Dankers requested that the County resume processing of the subdivision application and submitted a revised Master Permit Application identifying Mr. Gallo and the Dankers as the legal owners of

record of the subject property and removing the Mangats as contract purchaser. (CP 689). Mr. Gallo and the Dankers made substantial revisions to the plat application where after the Application was set on for hearing for preliminary plat approval before the Snohomish County Hearing Examiner on April 12, 2011. (CP 680-82, ¶ 2-3).

The Mangats filed a request for stay of proceedings before the Hearing Examiner claiming "ownership" of the permit application. (CP 709). Concurrent with that action, the Mangats filed the present action in Snohomish County Superior Court on March 22, 2011, as a Complaint for Declaratory and Injunctive Relief seeking to restrain the County from processing the subdivision application; or, in the alternative seeking damages for an alleged "taking" of the Mangats' ownership rights in the subdivision application by virtue of the County allowing Mr. Gallo and the Dankers to resume processing of the subdivision application. (CP 796-803). The issue as stated by the Mangats in their Complaint was as follows:

> It is the position of the Mangats that the permit rights, as related to a 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, ¶ 3.14).

After considering the response of the parties, the Hearing Examiner denied the Mangats' motion for stay of the proceedings reasoning as follows:

> [T]he Examiner finds that no party asserts that the dispute relates to the ownership of the underlying real property; . . .
>
> [A]ccording to RCW 36.70B.080, the Hearing Examiner has a duty to timely process a complete application signed by all of the owners of record, unless a valid dispute exists as to the underlying title to the real property. (In such cases, the courts have instructed that a case may be stayed until the title dispute is resolved. See Halverson v. Bellevue, 41 Wn. App. 457, 704 P.2d 1232 (1985) . . .
>
> . . . [T]he Applicants [Gallo and Dankers] have made an offer of proof that they are the legal owners of the underlying real property and are seeking to subdivide the property in question . . .
>
> . . . [T]he Hearing Examiner finds that no legal authorities have been presented by Respondents [Mangats] demonstrating that they are entitled to stay further processing of a land use application where they claim no ownership interest in the underlying real property . . .

(CP 712-13).

Following issuance of the foregoing Order by the Hearing Examiner the Mangats filed a motion for Temporary Restraining Order and Preliminary Injunction in the above entitled action on April 8, 2011. The Motion for Preliminary Injunction was heard by sitting Court of Appeals Judge Robert Leach, serving as Judge Pro Tem of the Snohomish County Superior Court on May 3, 2011. By Order dated May 16, 2011,

Judge Leach denied the Mangats' Motion for Preliminary Injunction concluding that they had no clear legal or equitable right to restrain the County's processing of the subdivision application stating, in pertinent part, 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). Following denial of the Mangats' Motion for Preliminary Injunction the subdivision application came on for hearing for preliminary

plat approval before the Snohomish County Hearing Examiner which was granted on May 17, 2011.[2] (CP 254-69).

Thereafter, the parties filed the respective cross-motions for summary judgment. As noted above, the County's motion was predicated upon the following issue of law:

> Whether, as a matter of law, rights created by virtue of a subdivision application constitute "in rem" property rights such that they run with the land and may be exercised by the legal owner of the property which is the subject of the application?

(CP 485, Issue No. 1). The motion of Defendants Gallo and Dankers raised a contract theory based upon the express assignment of all documents pertaining to the subdivision application contained in the purchase and sale agreement between the parties. (CP 455-477).

The cross-motion of the Mangats asserted a claim of unconstitutional taking based on the argument that the subdivision application and in particular the date of vesting of the application constituted the personal property of the Mangats and, thus, that by

---

[2] On July 5, 2011, the Mangats commenced a Land Use Petition Act (LUPA) appeal under Snohomish County Cause No. 11-2-06519-5, seeking review of the County's decision granting preliminary subdivision approval to Defendants Gallo and Dankers based on the same arguments raised in the present action. Following issuance of the Order Granting Summary Judgment in the above matter, the County moved to dismiss the Mangats' LUPA appeal and related claims for Writ of Mandamus and Writ of Prohibition based on the doctrine of collateral estoppel and lack of standing which motion was granted by "Order Granting Defendant Snohomish County's Motion to Dismiss LUPA Petition and Complaint for Writ of Mandamus and Writ of Prohibition" dated October 19, 2011. No appeal has been taken by the Mangats from that decision.

allowing Defendants Gallo and Dankers to continue processing the application utilizing the original vesting date the County had committed an "unconstitutional taking" of the Mangats property interest in the application. (CP 221-235). The issue raised in the Mangats' cross-motion for summary judgment was re-stated in the alternative in the County's motion as follows:

> Where a subdivision application is filed by a contract purchaser whose option to purchase the subject property is subsequently terminated, can such person retain any right or interest in the subdivision application for purposes of a claim of deprivation of a property interest?

(CP 485, Issue No. 2).

As set forth above, Judge Kurtz granted the respective motions of the County and Defendants Gallo and Dankers dismissing the Mangats complaint and concurrently denying the Mangats' cross-motion by Order dated August 17, 2011. (CP 9-13). This appeal was subsequently commenced by the Mangats on September 15, 2011.

IV. ARGUMENT

A. Standard of Review.

Appellate review of a decision granting summary judgment is de novo:

> In reviewing a grant of summary judgment, we engage in the same inquiry as the trial court. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A summary

> judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). "We review the trial court's conclusions of law de novo," Bingham v. Lechner, 111 Wn. App. 118, 127, 45 P.3d 562 (2002), but we may affirm the trial court "on any basis the record supports." Graff v. Allstate Ins. Co., 113 Wn. App. 799, 802, 54 P.3d 1266 (2002).

Deveny v. Hadaller, 139 Wn. App. 605, 616, 161 P.3d 1059 (2007).

In accordance with the above, where the parties do not contest the facts but only the legal conclusions resulting therefrom, summary judgment is appropriate. Rainier National Bank v. Security Bank, 59 Wn. App. 161, 164, 796 P.2d 443, review denied 117 Wn.2d 1004 (1990) (holding: "The parties do not contest the facts, only the legal issues resulting therefrom. Therefore, summary judgment was appropriate."); See also Harrington v. Pailthorp, 67 Wn. App. 901, 905, 841 P.2d 1258, review denied 121 Wn.2d 1018 (1992) (holding: "A case presenting only issues of law is properly resolved on summary judgment.")

There are no disputed issues of material fact in the present case as it pertains to the subdivision application. The Mangats filed the subdivision application as contract purchasers of the subject property with the consent of the underlying landowners, Gallo and Dankers. The Mangats interest in the property which is the subject of the subdivision

application was terminated effective December 16, 2009, when the purchase and sale agreements expired. There is no dispute regarding ownership of the subject property or any right or interest retained by the Mangats in said property. Rather, the sole issue is whether the Mangats can retain any right or interest in the subdivision application once their interest in the real property is terminated. This presents solely a question of law.

B. Land Use Application Creates Vested Rights in Real Property.

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 the 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. (See Appellants' Opening Brief, pg. 27).

This rule of law was first announced by our state Supreme Court in Clark v. Sunset Hills Memorial Park, 45 Wn.2d 180, 273 P.2d 645 (1954), wherein the court held that a successor in interest to real property may exercise all vested rights acquired by a predecessor in interest under a previous land use application. Id. at 189-90.

In Clark, the Defendant's predecessor in interest obtained a permit from King County to use a portion of property rezoned from agricultural

to residential for a cemetery following which a plat of the cemetery was filed. Clark, 45 Wn.2d at 183. Prior to development of the cemetery the initial owner became insolvent and the property was sold to a residential developer who in turn sold a portion of the property to the Defendants. Id.

Following acquisition of the property, the Defendants filed a revised plat for a reduced cemetery plot layout. Adjacent neighbors challenged the development of the cemetery arguing that no permit had been issued to the particular Defendants authorizing operation of a cemetery. In rejecting this argument the court held as follows:

> The permit referred to by the trial court was granted when Overlake Memorial Cemetery owned the land concerned. Appellants maintain that the permit to establish a cemetery . . . did not run with the land. From this, appellants contend that, since no permit to establish a cemetery has been granted to Sunset Memorial Park, the maintenance of a cemetery by that corporation is unlawful.
>
> On the other hand, respondents contend that the term "permit," when used in connection with zoning, is merely a matter of zoning terminology, a subclassification or refinement of land-use classification, rather than a personal privilege or license. We are inclined to agree.
>
> . . .
>
> The exercise of zoning powers by county planning commissions and boards of county commissioners ***involves more than the granting of purely personal licenses or privileges. . .***
>
> ***These powers do not contemplate the restriction or authorization of land use on the basis of ownership by particular persons. . .***

Clark, 45 Wn.2d at 189-90; See also Northwest Land and Investment, Inc. v. City of Bellingham, 31 Wn. App. 742, 743, 644 P.2d 740 (1982) (recognizing that successor in interest to real property which was subject to preliminary plat approval at time of acquisition had standing to file revised final plat design and challenge conditions of plat approval).

The foregoing rule of law is widely recognized in other jurisdictions, to wit: that permits and approvals respecting the use and development of land are *in rem* in character rather than *in personum*.[3] Thus, as an "in rem" property right the rights accruing under a land use permit are deemed to run with the land. See Upper Minnetonka Yacht Club v. City of Shorewood, 770 N.W.2d 184, 187 (Minn. 2009) (holding that a conditional use permit: "[I]s not a personal license, but a protected property right" and 'runs with the land and continues to encumber

[3] 4 Rathkopf's The Law of Zoning and Planning § 69:6 (4th ed. 2009); Anza Parking Corp. v. City of Burlingame, 195 Cal. App. 3d 855, 858, 241 Cal.Rptr. 175 (1987) ("it is widely held that a conditional use permit creates a right which runs with the land; it does ***not*** attach to the permittee....The same rule prevails throughout the nation"); Matter of Lefrack Forest Hills Corp. v. Galvin, 40 A.D.2d 211, 338 N.Y.S.2d 932 (1972) (assuming, without discussion, that the building permits at issue attached to and ran with the land as ownership of the land changed hands); State ex rel. Parker v. Konopka, 119 Ohio App. 513, 515, 200 N.E.2d 695 (1963) (holding that a use variance granted to a previous owner of the real property ran with the land to the benefit of the current owner of the real property); Clements v. Steinhauer, 15 A.D.2d 72, 76, 221 N.Y.S.2d 793 (1961) (holding a subtenant was entitled to the benefits of a use permit obtained by the landlord's predecessor in title); Guenther v. Zoning Board of Review of the City of Warwick, 85 R.I. 37, 41-42, 125 A.2d 214 (1956) (holding the identity of a contract purchaser for the property at issue was irrelevant in the adjudicating the property owner's request for a variance); O'Connor v. City of Moscow, 69 Idaho 37, 43, 202 P.2d 401 (1949) (holding that an ongoing non-conforming use could not legally be extinguished by a change in ownership of the property).

property even after it is conveyed to subsequent owners"); Anza Parking Corp. v. City of Burlingame, 195 Cal. App.3d 855, 858-59 (1987) (holding: "[I]t is widely held that a conditional use permit creates a right which runs with the land; it does not attach to the permittee"); Michael Weinman Associates General Partnership v. Town of Huntersville, 555 S.E. 2nd 342, 345 (N.C. App. 2001) (stating common law rule that vested rights attach and run with the land); Faircloth v. Lyles, 592 So.2d 941, 945 (1991) (holding: "a nonconforming use is not a personal right but one that runs with the land"); State v. Konopka, 119 Ohio App. 513, 515 (1963) (holding that the "general rule" is that the grant of a variance "runs with a land and is not a personal license given to the landowner"); Holthaus v. Zoning Board of Appeals of Town of Kent, 209 A.D.2d 698, 699-700, 619 N.Y.S. 2d 160 (N.Y. App. Div. 1994) (holding that land use variance runs with the land and remains effective until properly revoked).

In the present case, the Mangats ask this court to depart from that rule of law as it relates to a land use application which has yet to ripen into issuance of an actual permit, and urge this court to conclude that the "vested rights" doctrine merely vests rights in favor of whomever the named applicant is on a land use application, and does not vest any rights in the real property itself. (See Appellants' Opening Brief, pg. 12). The

argument was stated by the Mangats in their response to the County's motion for summary judgment as follows:

> The Mangats assert their vesting rights under an application in Washington, are in personam prior to final platting (i.e., approval, grant, or permitting of a non-conforming use) because the rights are not attached to the land until approved and recorded by the County.

(CP 165, lines 12-16).

The Mangats argument is that the vested rights doctrine should be confined to a narrow interpretation of the right as codified in RCW 58.17.033 as merely vesting a personal right in the applicant/developer to have his/her application processed under the ordinances then in effect at the time of submission of the application. (See Appellants' Opening Brief, pg. 17-22). While this is the literal requirement of RCW 58.17.033, the vested rights doctrine has never been constrained to creating solely a personal right in the named applicant. On the contrary, it has repeatedly been held by our courts that the vested rights doctrine is a fundamental component of the constitutionally cognizable right to the use and enjoyment of land. See Mission Springs v. City of Spokane, 134 Wn.2d 947, 962, 954 P.2d 250 (1998) (holding: "Mission Springs had a constitutionally cognizable property right in the grading permit it sought. The right to use and enjoy land is a protected property right."); West Main Associates v. Bellevue, 106 Wn.2d 47, 50, 720 P.2d 782 (1986) (holding:

"[a]lthough less than a fee interest, development rights are beyond question a valuable right in property.")

While the doctrine of "vested rights" has been interchangeably referenced in the context of both owner and developer, the right emanates from the fundamental constitutional right of an individual to utilize his own land as he sees fit. See West Main Associates, 106 Wn.2d at 50 (holding: "One aspect of this court's protection of these rights [U.S. Const. amends. 5 and 14] is our vested rights doctrine.") Thus, the vested rights doctrine has universally been discussed in the context of the use of the land which is the subject of the application as follows:

> These due process considerations require that developers be able to take recognized action under fixed rules governing the development of their land. West Main Assocs., at 51. The ***right of a property owner*** to use his property under the terms of the zoning ordinance prevailing at the time that he applies for a building permit has been settled for over half a century. State ex rel. Hardy v. Superior Court, 155 Wash. 244, 284 P. 93 (1930). The precept was stated in State ex rel. Ogden v. Bellevue, 45 Wn.2d 492, 495-96, 275 P.2d 899 (1954), which is often quoted as follows:
>
> > A ***property owner*** has a vested right to use his property under the terms of the zoning ordinance applicable thereto. A building or use permit must issue as a matter of right upon compliance with the ordinance. The discretion permissible in zoning matters is that which is exercised in adopting zone classifications with the terms, standards, and pertinent thereto, all of which must be by ordinance applicable to all persons alike. The of administering a zoning ordinance do not go back the questions of

> policy and discretion which were settled the time of the adoption of the ordinance. Administrative are properly concerned with questions of compliance the ordinance, not with its wisdom. To subject individuals questions of policy of administrative matters would unconstitutional . . . .
>
> . . . An ***owner of property has a vested right*** to it to a permissible use as provided for by prevailing ordinances. The right accrues at the time an application a building permit is made. The moves and countermoves the parties hereto by way of passing ordinances and actions for injunctions, should and did avail parties nothing. A zoning ordinance is not retroactive as to affect rights that have already vested. (Citations omitted.)

Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 636-37, 733 P.2d 182 (1987) [emphasis added].

In Hull v. Hunt, 53 Wn.2d 125, 331 P.2d 856 (1958), the court held that the vested rights doctrine was not limited to one who is an owner of the real property but also extends to secure the prospective property rights of a developer. In holding that the vested rights doctrine applied irrespective of whether the applicant was the owner of the property, the court held as follows:

> 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. This rule, of course, assumes that the permit applied for and granted be consistent with the zoning ordinances and building codes in force at the time of application for the permit.

> 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, 53 Wn.2d at 130.

Mangats rely upon the holding of the court in Hull v. Hunt to argue that the vested rights doctrine as declared by our courts merely protects the rights of the "developer" irrespective of the land and, thus, should be construed as being a personal property right and not a right attaching to the land until a permit is issued. (See Appellants' opening Brief, pg. 14-16). This argument misconstrues the holding of the court in Hull as well as the nature of the vested rights doctrine itself. The rights which "vest" under the vested rights doctrine do not vest in any one person, applicant or not; Rather, they vest in the real property which is the subject of the application and only a person who acquires title or the right of possession of such property can exercise those rights. Thus, as noted by the court in Hull, it makes no difference whether the applicant is the

owner of the property or not, ***the rights created can only be exercised by one having title or possession of the property***.

This is the fundamental basis for Judge Leach's decision in which he denied Plaintiffs' motion for preliminary injunction in this matter, recognizing that the Plaintiffs could assert no vested right under a land use application to develop land in which they no longer had any right or claim of interest in as follows:

> 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.

(See CP 560-63, Order Denying Motion for Preliminary Injunction dated May 16, 2011, pg. 3, ¶ 6).

The only right which is created by the filing of a land use application is the "***vested right***" to develop the real property in accordance with the zoning and land use regulations in effect at the time of the filing of the application once the permit is issued. As stated by the court in Valley View Indus. Park v. Redmond, 107 Wn.2d 621, 733 P.2d 182 (1987), that right is one which can only be exercised by the property owner (or one having a right of possession) as follows:

> The right of a ***property owner*** to use his property under the terms of the zoning ordinance prevailing at the time that he applies for a building permit has been settled for over half a century. State Ex Rel. Hardy v. Superior Court, 155 Wash. 244, 284 P. 93 (1930).

Valley View, 107 Wn.2d at 636.

While a person who is not the property owner can act as the "applicant" for purposes of submitting the land use application, the "vested rights" created attach to the real property and can only be exercised by one having some right or interest in the real property. There is no authority or case law suggesting that "vested rights" are severable from the real property and can be retained by a developer as a commodity independent of an interest in the real property as the Mangats would seek to do in this matter. On the contrary, as reflected by the holding of the court in Hull v. Hunt, such vested rights can only be exercised by one who acquires title or a right of possession in such real property. For this same reason, as more fully discussed in Section D below, having no further right or interest in the real property which was the subject of the subdivision application, the Mangats can establish no "taking" or other impairment of a vested right to develop real property in which the Mangats have no claim of title or right of possession.

C. **Rights in Application Reverted to Owners of Land Upon Termination of Purchase and Sale Agreement.**

In the alternative, Defendants Gallo and Dankers moved for summary judgment upon the grounds that even if the Mangats retained some right in the subdivision application as the applicant, such rights were expressly transferred and assigned in this case by the Mangats to Defendants Gallo and Dankers upon termination of the purchase and sale agreement in accordance with the following contract provision:

> 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, ¶ 1(c)). In construing the foregoing language as it pertained to the Mangats' motion for preliminary injunction, Judge Leach held as follows:

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 562, Order Denying Motion for Preliminary Injunction dated May 16, 2011, pg. 3, ¶¶ 8-9).

The County incorporates by reference the argument of Defendants Gallo and Dankers set forth at pages 10-16 in the Brief of Respondents Johannes Dankers, Martha Dankers and Luigi Gallo, in support of this argument as an alternative grounds upon which to affirm the grant of summary judgment in this matter. However, the County urges this Court to affirm the trial court's grant of summary judgment on the ground that such rights, as a matter of law, are vested in the real property as opposed to the named applicant and may be exercised by such person having the right of possession or control of the property to avoid the necessity of a governmental entity having to scrutinize every developer contract, contract for sale or other transfer documents to determine whether such rights have been assigned where the named applicant is different from the underlying property owner.

D. Mangats Cannot Assert Deprivation of a Property Interest in a Land Use Application Affecting Property in Which Claimant Has No Interest.

Finally, the Mangats appeal the trial court's denial of their cross-motion for summary judgment seeking a determination that the County effected an unconstitutional taking of the Mangats' claimed property interest in the subdivision application by allowing Defendants Gallo and Dankers to resume processing the application under the original vesting date of the Mangats' application. The foregoing claim is stated in Plaintiffs' complaint as follows:

> Defendants acted under color of state law and violated Plaintiffs' rights under the Fifth and the Fourteenth Amendments of the U.S. Constitution and Art. 1, Sec. 16 of the Washington Constitution by the taking the Plaintiffs' property without just compensation by requiring the Mangats to continue processing of the Development Application, over their specific denial of such authorization for continuing such processing and consideration, thereby effectively transferring the Mangats rights in the permit to Gallo and Dankers without authority of law.

CP 799-800, Complaint for Declaratory and Injunctive Relief dated March 21, 2011, pg. 4-5.

The Mangats' argument presupposes that there was some property interest they could retain in the subdivision application for purposes of a claim of deprivation. See e.g. Kruger v. Horton, 106 Wn.2d 738, 743, 725 P.2d 417 (1986) (holding in the context of a tort claim for conversion

that: "The plaintiff in a conversion action must prove a right to possess the property converted."); See also 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.")

For the reasons set forth above, the rights in a land use application secured under the "vested rights" doctrine pertain to the use and enjoyment of the land which is the subject of the land use application. Accordingly, such rights are inseparable from the real property (i.e. they cannot be exercised by one having no right of possession or control over the real property). Thus, there was no right or interest in the subdivision application which the Mangats could be deprived of once their interest in the real property terminated.

The Mangats own brief lacks any citation to authority supporting the proposition that a third-party applicant who no longer has an interest in the real property, which is the subject of a land use application, can retain some property right or interest in that application. In this regard, the Mangats reliance on the holding of the court in Vashon Island v. Washington State Boundary Review Board, 127 Wn.2d 759, 903 P.2d 953 (1995), is misplaced. In Vashon, the court addressed whether the "vested rights" doctrine applied to a petition for incorporation. After noting that

the doctrine had been limited to land use applications, the court characterized a vested right as follows:

> The vested rights doctrine is based on constitutional principles of fundamental fairness, reflecting an acknowledgment that development rights are valuable and protectable property rights. Erickson & Assocs., Inc. v. McLerran, 123 Wn.2d 864, 870, 872 P.2d 1090 (1994). However, "[a] vested right involves 'more than . . . a mere expectation'; ***the right must have become 'a title, legal or equitable, to the present or future enjoyment of property.***'" In re F.D. Processing, Inc., 119 Wn.2d 452, 463, 832 P.2d 1303 (1992) (citations omitted). [emphasis added]

Vashon Island, 127 Wn.2d at 768.

As recognized by the court therein, the "right" which arises under the vested rights doctrine is inseparable from the right of use and enjoyment of the real property which is the subject of the land use application. It is inextricably linked to the title to the real property itself where one has a right to the present or future enjoyment of the property. Thus, one who has no legal or equitable right to the present or future enjoyment of real property which is the subject of a land use application can assert no claim of vested right in such application. Accordingly, Judge Kurtz did not err in denying the Mangats' cross-motion for summary judgment.

E. Statutory Costs and Attorney's Fees

Pursuant to Rule of Appellate Procedure 18.1, RCW 4.84.010 and 4.84.080, the County requests its statutory costs and attorneys' fees.

V. CONCLUSION

Once the Mangats' interest as contract purchasers in the subject property terminated, there were no further right they could retain in the subdivision application as such rights attach to the real property and can only be exercised by one having a legal or equitable claim to the present or future enjoyment of the property. Conversely, Defendants Gallo and Dankers, as the underlying property owners, were entitled to exercise such rights and request the County to continue processing the subdivision application. Such conduct by the County neither "took" any property from the Mangats to which they were entitled, nor did it deny the Mangats of anything to which they had a right.

Respectfully submitted this 5th day of April, 2012.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: _____
BRIAN J. DORSEY, WSBA #18639
Deputy Prosecuting Attorney
Attorneys for Respondent Snohomish County

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 5th day of April, 2012, Snohomish County's Response Brief was served upon the persons listed and by the method(s) indicated:

Parties Served:

Appellants Mangat

Scott E Stafne
Andrew J. Krawczyk
Stafne Law Firm
239 N. Olympic Avenue
Arlington, WA 98223
scott.stafne@stafnelawfirm.com;
andrew@stafnelawfirm.com

- ☐ ABC Legal Messenger
- ☐ Hand Delivery
- ☒ U.S. Mail, postage prepaid
- ☐ Fax: (360) 386-4005
- ☒ Email

Respondents Gallo & Dankers

Kenneth H. Davidson
Davidson, CZeisler & Kilpatric PS
520 Kirkland Way, Suite 400
P.O. Box 817
Kirkland, WA 98083
kdavidson@kirklandlaw.com

- ☐ ABC Legal Messenger
- ☐ Hand Delivery
- ☒ U.S. Mail, postage prepaid
- ☐ Fax: (425) 827-8725
- ☒ Email

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 5th day of April, 2012.

Regina McManus