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No. 67712-8-I

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

In the Matter of

KHUSHDEV MANGAT, et ux.,
Appellants

vs.

SNOHOMISH COUNTY, et al.,
Respondents/Appellees

APPEAL FROM SUPERIOR COURT
FOR SNOHOMISH COUNTY

BRIEF OF RESPONDENTS JOHANNES DANKERS, MARTHA DANKERS AND LUIGI GALLO

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I. INTRODUCTION

This case involves purchase and sale agreements under which the appellants as buyers had up to 14 months to obtain preliminary approval of the subdivision of the land of appellees, Johannes and Martha Dankers ("Dankers") and Luigi Gallo ("Gallo"), and close their purchase at a fixed price. The purchase agreements obligated the appellants to turn over to the Dankers and Mr. Gallo all of the maps, drawings, studies and other documents related to the development of the property in the event of their default. The appellants defaulted on their contracts on December 16, 2009. In January, 2010, Mr. Gallo met with Snohomish County planners about carrying forward the subdivision application of the Dankers and Gallo property which the appellants had begun. In response to objections from appellants, the Snohomish County Prosecutor's Office advised the Appellants and the county planners by letter in February, 2010, that the application to subdivide the land was "in rem" in nature and was properly continued by the Dankers and Mr. Gallo as the property owners. The Dankers and Mr. Gallo expended over $18,000 over the next year on engineers and consultants to correct the plat design and address requests for information from the County. Their work resulted in the County planning department issuing a staff report recommending preliminary approval of the subdivision with conditions and setting a hearing before

the hearing examiner. In March ,2011, the appellants filed suit seeking to enjoin further processing of the subdivision. Their motion for a preliminary injunction was denied. The hearing examiner granted preliminary approval of the subdivision.

Dankers and Gallo and Snohomish County each filed motions for summary judgment to dismiss appellants' complaint. The appellants filed a cross motion for partial summary judgment requesting that the court find that Snohomish County had "taken" their rights under the subdivision application without just compensation. The trial court heard all three motions at the same hearing and granted the motions of the appellees and denied the motion of the appellants.

II. ASSIGNMENTS OF ERROR

Respondents Dankers and Gallo object to Appellants' Assignment of Error II. B and II. D on the grounds that the trial court made no such specific findings and to Appellants Assignment II. D on the further grounds that Appellant is attempting to raise for the first time on appeal issues not pled or otherwise raised before the trial court.

III. STATEMENT OF ISSUES

1. When the appellants lost their rights to purchase the land and were required under their contracts to turn over to Dankers and Gallo all maps, drawings, studies, reports and other documents related to the

subdivision of the land, did the appellants retain any right to halt or interfere with the finalizing of the pending application for the subdivision of the Dankers and Gallo properties?

2. Does a party submitting an application to subdivide land acquire any personal right which is separate from the real property and continues after the party loses all rights to the real property?

3. If the Court of Appeals reverses the trial court's granting of Snohomish County's motion for summary judgment and denying of the Appellant's motion for partial summary judgment, should the trial court's order granting the motion for summary judgment by Dankers and Gallo be affirmed on the grounds that:

a. The equitable relief requested by Appellants is barred by the doctrine of laches;

b. The appellants have demonstrated no actual and substantial injury to justify an injunction, while Dankers and Gallo would suffer grievous hardship under an injunction; and/or

c. The appellants will have made an election of remedies in obtaining partial summary judgment against Snohomish County for a taking, which entitles them to money damages, and may not also receive injunctive relief against the interest of Dankers and Gallo.

IV. STATEMENT OF CASE

1. Johannes and Martha Dankers own a 31.85-acre tract of undeveloped land which abuts a 40-acre tract owned by Luigi Gallo. The plaintiffs approached the Dankers and Mr. Gallo about purchasing and subdividing their properties in 2006, when the housing market in Snohomish County was booming and real estate prices were escalating. The plaintiffs entered separate purchase and sale agreements with the Dankers and Mr. Gallo, which contained identical terms. Both agreements contained an addendum which required that the plaintiffs prepare and submit a complete application for the subdivision of the properties after completion of the 60-day feasibility and that they diligently pursue approval of the subdivision. CP at 636-649 (Agreements and Addendums). The addendums further provided that the plaintiffs would turn over to the Dankers and Mr. Gallo all maps, plans, drawings, studies, reports and other written documents related to the subdivision of property in the event the plaintiffs defaulted under the purchase and sale agreement. The intent and agreement among the parties was that the Dankers and Mr. Gallo would proceed with obtaining approval of the subdivision of their properties in the event of the Mangat's default. CP 629-631 (Declaration of Johannes Dankers).

2. Through a series of amendments, the closing date for the plaintiffs' purchase of the properties was extended to December 16, 2009. CP 196 (Declaration of Harbhajan Mangat p.2) and CP 631 (Declaration of Johannes Dankers p.3). However, in September, 2009, the Mangats lender declined their request for a development loan to finance the cost of acquisition of the property and subdivision improvements. CP 631 (Declaration of Johannes Dankers). The Mangats ceased processing the subdivision application and did not pay consultants working on that subdivision. CP 632 (Declaration of Johannes Dankers). They could not and did not close the purchase of the property in December 16, 2009. The Dankers and Mr. Gallo then declared them in default and took over the processing of the subdivision application. CP 632 (Declaration of Johannes Dankers).

3. In January and February, 2010, the Mangats made efforts to convince Snohomish County's Department of Planning and Development Services that the Dankers and Mr. Gallo did not have the right to direct for the processing of the pending subdivision application. CP 196 (Declaration of Harbhajan Mangat) By her letter dated February 22, 2010, Snohomish County Deputy Prosecuting Attorney, Bree Urban, advised the plaintiffs through their attorney, Thom H. Graafstra, of the County's position that the subdivision application followed the ownership of the real

property and that the Dankers and Mr. Gallo as the owners of the property could direct the further processing of the subdivision of the application. CP 214-215 (Exhibit 2 to Declaration of Harbhajan Mangat).

4. The Dankers and Mr. Gallo hired land use consultant, Ry McDuffy, and his firm known as Land Resolutions to assist them in continuing to process the pending subdivision application for their property. Mr. McDuffy reviewed the file and determined that the Mangat's proposed plat for the property was deficient in several ways and that there were outstanding issues and problems identified by County staff which needed to be addressed. Mr. McDuffy summoned a new team of engineers and surveyors who redesigned the plat layout, submitted a revised proposed plat and responded to outstanding requests for information and issues identified by the County's planning staff. Over the next 14 months, the Dankers and Mr. Gallo paid $18,000 in consulting fees to Mr. McDuffy's firm and team of consultants to process the plat application. CP 679-682 (Declaration of Ry McDuffy). The County's planning staff completed their staff report recommending approval of the subdivision application with conditions, and a hearing on preliminary approval was set for April 12, 2011. CP 683, 698-707 (Declaration of Ry McDuffy).

5. Through their attorney, Scott Stafne, the Mangats requested that the hearing examiner stay the April 12 hearing on the grounds that the Mangats claim to "own" the application. CP 683 (Declaration of Ry McDuffy). The hearing examiner issued an order calling for additional information from the parties of record to address the request in the Mangat's to stay the proceeding. She received submittals from Mr. Stafne and the Mangat's land use consultant, Gene Miller, as well as from counsel for the Dankers and Ed Caine on behalf of the Department of Planning and Development Services. CP 683 (Declaration of Ry McDuffy). The hearing examiner considered the submittals and entered her order denying the plaintiffs' motion for a stay by her order dated April 5, 2011. CP 712-713 (Exhibit 5, Declaration of Ry McDuffy).

6. Without any notice to defense counsel, plaintiffs' counsel, James Watt, appeared on April 8 before the Court Commissioner of this Snohomish County Superior Court with a motion for a temporary restraining order and convinced the Court Commissioner to enter that temporary restraining order. CP 568 (Declaration of Mary Sakaguchi).

7. With notice to plaintiffs' counsel, attorneys for Dankers and Gallo, brought a motion to quash the temporary restraining order. An associate from the Law Office of Scott Stafne appeared, but did not

oppose the motion to quash the TRO and an agreed order was entered in this action on April 11, quashing the TRO. CP 568-569 (Declaration of Mary Sakaguchi). Unfortunately, prior to receiving the order quashing the TRO, the hearing examiner canceled the April 12 hearing because she had received a copy of the TRO. Upon learning of the order quashing the temporary restraining order, the hearing examiner determined that the hearing on the preliminary approval of the subdivision should be reset for May 11, 2011. CP 570 (Declaration of Mary Sakaguchi).

8. On May 3, 2011, the Mangat's motion for a preliminary injunction staying proceedings on the short plat application came on for hearing before Court of Appeals Judge Robert Leach, serving as judge pro tem of the Snohomish County Superior Court. Judge Leach entered an oral decision making certain findings and denying the motion for preliminary injunction and directed that the parties submit written findings and an order for his execution. On May 16, 2011 Judge Leach entered his written decision denying the Mangat's motion for preliminary injunction. CP 560-564 (Order Denying Motion For Preliminary Injunction).

9. On May 11, 2011, the hearing examiner, Millie Judge, held a hearing on the application for the subdivision of the Dankers' and Gallo property. On May 17, 2011, the Snohomish County hearing examiner

entered a decision granting approval of the plat application with conditions. CP 254-269 (Decision of Snohomish Co. Hearing Examiner).

10. The Mangat's appealed the hearing examiner's decision to the Snohomish County Council. Mr. and Mrs. Dankers and Mr. Gallo moved for summary dismissal of the appeal pursuant to S.C.C. 30.72.075. CP 304-314 (Motion for Summary Dismissal).

11. On June 15, 2011, the Snohomish County Council summarily dismissed the appeal. CP 327-329 (County Council Dismissal).

12. On July 5, 2011, the Mangats filed a petition in Snohomish County Superior Court for review of the decisions by the Snohomish County Council and hearing examiner, pursuant to the Land Use Petition Act, under Snohomish County Superior Court Cause No. 11-2-06519-5. Partial summary judgment was entered against the Mangats in that action, but as appellants point out that case is not before this Court on appeal (*Appellants' Opening Brief* at 8).

13. The Mangats do not own any property in the area of the defendants' property. They will be in no way negatively impacted by the decision of the hearing examiner granting preliminary approval of the plat application or by the final approval and recording of the plat subdividing

the property of Dankers and Gallo. CP 633 (Declaration of Johannes Dankers).

14. At the time of the hearing on their motion for a preliminary injunction, the appellants had another lawsuit pending in Snohomish County Superior Court in which they sought money damages for "unjust enrichment" against the Dankers and Mr. Gallo. Appellants counsel suggested that the appellees "get rid of" the action for an injunction, intimating that payment be made to appellants. CP 451-451 (Declaration of Kenneth H. Davidson).

V. ARGUMENT

1. <u>The Appellants cannot claim any right in the application for the subdivision of the Dankers' and Gallo property because all such rights were forfeited when they defaulted on their purchase contracts</u>. An application to subdivide land is not personal property, but rather a process for requesting permission from a local jurisdiction to subdivide land in accordance with state and local laws governing subdivision of land. Judge Leach entered the following findings in his order denying plaintiffs' motion for preliminary injunction which succinctly identify the fallacy in the appellants' claim to own the application for the subdivision of the Dankers and Gallo property:

> 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
> . . . .
>
> 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. CP 562 (Order Denying Motion For Preliminary Injunction).

The 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. Indeed, a subdivision of land cannot be accomplished without the property owner's written consent and any subdivision recorded without the consent of an owner is void. Halverson v. Bellevue, 41 Wn. App. 457, 704 P.2d 1232 (1985) .

There is a clear statutory requirement for the participation of the owner of the property in the subdivision process. RCW 58.17.165 provides in relevant part:

> Every final plat or short plat of a subdivision . . . filed for record must contain a certificate giving a full and correct description of the lands divided . . . including 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**.
>
> If the plat . . . is subject to a dedication, the certificate . . . shall contain the dedication of all streets and other areas to the public,. . . Said certificate or instrument of dedication shall be signed and acknowledged before a notary public **by all parties having any ownership interest** in the lands subdivided and recorded as part of the final plat.
>
> Every plat . . . containing a dedication filed for record must be accompanied by a title report confirming that the title of the lands as described and shown on said plat is in the name of the **owners** signing the certificate or instrument of dedication. (emphasis added)

Thus, an application for the subdivision of land can take no effect unless the owner of the property participates in the subdivision process. In Halverson, the court set aside a plat because an owner of land within the plat did not sign the plat certification as required by RCW 58.17.165. In Halverson, the Morgans filed a preliminary plat application with the City of Bellevue seeking to subdivide a plat of land for residential development. Their neighbor, Ms. Halverson, claimed ownership by adverse possession of a strip of land included in the Morgans' plat. Ms. Halverson notified the City of Bellevue of her claim of ownership and objection to the subdivision of the land. She filed a quiet title action with respect to the strip of land. Nevertheless, the City Council granted final

approval of the plat. Ms. Halverson brought suit against the City of Bellevue challenging the validity of the plat. She had prevailed in her quiet title action. In the trial on her action challenging the validity of the plat, the court ruled that the plat was invalid because it lacked the written consent of one of the owners of the land within the plat. The Mangats likely understood the necessity of the owners' participation in the subdivision process when they included in the Addendum to their purchase and sale agreements the requirement that the Dankers and Mr. Gallo sign documents the County may require for the subdivision of the property.

If the Mangats lacked standing to subdivide the land of the Dankers and Gallo before they entered their purchase agreements, then on what basis do they have any standing or right to participate in the subdivision of the land after they defaulted on their purchase contract? This question is particularly hard for the Mangats to answer in light of the provisions of this purchase and sale agreement which required them to turn over to Dankers and Mr. Gallo all of the studies, maps, drawings and other documents related to the development of the property following a default by the Mangats.

An analysis of the Mangat's contract rights in this case is instructive and points to the conclusion voiced by Judge Leach that

following the Mangats' default "there is nothing left for them to own". An important term of their purchase agreements with the Dankers and Mr. Gallo allowed the Mangats up to 14 months to obtain preliminary plat approval and to close the purchase of the land. Ry McDuffy, an experienced land consultant and developer, points out in his declaration that this agreement was entered when the real estate market was appreciating rapidly and that a contract provision fixing the price of property for 14 months was quite valuable at that time. CP 686 (Declaration of Ry L. McDuffy). The Dankers and Gallo recognized the value of this contract right and received consideration for it. In particular, Dr. Dankers testifies in his declaration that he and Mr. Gallo were told by the Mangats that moving the property through the subdivision process would enhance the value of the property. CP 630 (Declaration of Johannes Dankers). Based on those representations, they included in the Addendum to their purchase and sale agreements two important provisions. First, paragraph 1a. of the Addendum requires the Mangats to submit a complete application for the subdivision of the land "as soon as reasonably possible" after the feasibility study period and to "promptly" supply the County with all additional information it may require to approve the subdivision application. CP 648 (Declaration of Johannes Dankers). Second, paragraph 1.c of the Addendum required the Mangats

to provide the Sellers with all copies of subdivision submittals to the County and further stated:

> In the event the Buyer terminates this agreement under the Feasibility Contingency Addendum or defaults on the terms on 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. CP 648 (Declaration of Johannes Dankers).

Dr. Dankers testifies that the intent of the above provisions of paragraph 1.c were to put the Dankers and Mr. Gallo in a position to complete the subdivision process in the event the Mangats defaulted. CP 630 (Declaration of Johannes Dankers). Thus, in exchange for the right to tie up the property at a fixed price for up to 14 months, the Mangats were obligated to start and diligently pursue an application for the subdivision of the property and, in the event of their default to turn over to the Sellers all the work product and documents related to the planned development of the property, so that Dankers and Gallo could finish the subdivision process.

It is undisputed that the Mangats defaulted on the purchase contracts by failing to close the purchase by the agreed, extended closing date of December 16, 2008. The sellers held them in default and, as the appellants acknowledge in their opening brief, Mr. Gallo met with County

officials the next month to take over the processing of the application. The Mangat's failure to perform under the contracts caused their purchase rights to expire and required them to turn over to the Dankers and Mr. Gallo all the maps, drawings, studies, reports and other documents which comprised the application to subdivide the property. They lost their rights to purchase and to participate in the subdivision of the property, not because of any "taking" by the County, but because of their own default under the contract.

In sum, the role the appellants played in submitting an application for the subdivision of the Dankers and Gallo property was first authorized and, indeed, required by their purchase agreements with Dankers and Gallo. That role ceased upon their default. By the terms of those agreements, they were required to relinquish to Dankers and Gallo all the documents which were used in the subdivision process.

2. The courts have consistently held that zoning and permit rights run with the land and have never recognized the concept of personal ownership of land use rights independent from the land. Washington courts have uniformly recognized rights under zoning regulation and permits to be related to the land and the rights of the owner to use and develop the real property involved. In discussing the vested rights, the Washington State Supreme Court in Valley View v. City of

Redmond, 107 Wn.2d 621, 733 P.2d 182 (1987) stated: "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." *Id* at 636 (emphasis added). In the State ex. rel. Ogden v. Bellevue, 45 Wn.2d 492, 275 P.2d 899 (1954), the court stated: "A **property owner** has a vested right to use his property under the terms of zoning ordinances applicable thereto . . . . An **owner of property** has a vested right to put it to a permissible use as provided by the prevailing zoning ordinances. The right accrues at the time an application for a building permit is made." *Id* at 495-96. (emphasis added). The Washington State Supreme Court has consistently recognized rights under permits to be valuable rights related to the real property. See Mission Springs v. City of Seattle, 134 Wn.2d 947 (954 P.2d 250) (1998), West Main Associates v. Bellevue, 106 Wn.2d 47, 720 P.2d 782 (1986). The court has further recognized that land use permit rights obtained by one property owner runs with the land, may be exercised by the successor in title and is not personal to the prior owner. Clark v. Sunset Hills Memorial Park, 45 Wn.2d 108, 273 P.2d 645 (1954). There are no Washington cases to our knowledge which recognize a vested right or land development right as personal property or a right held separately from ownership of the real property.

Courts across the country have consistently ruled that permits and approvals respecting the use and development of land are in rem in character rather than in personam. The rights accruing under various land use, approvals and permits have been uniformly 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 property even after it is conveyed to subsequent owners"); Anzai 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. 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 (N.Y. App. Div. 1994) (holding that land use variance runs with the land and remains effective until

properly revoked); Lefrack Forest Hills Corp. v. Galvin, 40 A.D.2d 211, 338 N.Y.S.2d 932 (1972) (dismissing as grounds for denying extensions of a building permit the fact that property ownership had changed and the party requesting the extension had no interest in the property at the time of the issuance of the building permit and earlier extensions of it); 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 21 (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'Conner v. City of Moscow, 69 Idaho 37, 43, 202 P.2d 401 (1949) (holding that an ongoing non-conforming use could not be legally be extinguished by a change in ownership of the property).

While none of the above cited cases involve applications for subdivisions, the Anzai Parking Corp. case involves arguments nearly identical to those raised by the appellant in this case. In that case, Anzai Parking leased property and obtained a conditional use permit from the City of Burlingame to operate a parking facility. The conditional use permit contained a provision stating that it was not transferable. When Anzai Parking's lease expired, the property owner declined to sign a new

lease with Anzai Parking. Instead, the owner leased the property to another company who continued to operate the parking facility. Anzai Parking claimed that it was the applicant under the conditional use permit and asked the City to enforce the non-transfer provision of the permit and stop the property owner and the new lessee from operating the parking facility. The City Attorney advised that the non-transfer provision was unenforceable and that the conditional use permit ran with the land. Anzai Parking then sued the City seeking a writ of mandamus to compel it to enforce the non-transfer provision of the conditional use permit and stop the operation of the parking facility. In affirming the trial court's dismissal of Anzai Parking's lawsuit, the appellate court ruled that " . . . a conditional use permit creates a right which runs with the land; it *does not attach to the permittee*." *Id* at 858 (emphasis not added). The appellate court further noted: "The same rule prevails throughout the nation" and cited cases from five other states. *Id* at 859. It concluded with the observation: "In our research we have encountered no contrary authority." *Id* at 860.

Both Anzai Parking and Mangats initiated applications for land use permits at a time when they held contract interests in the subject land. Both had their contract rights expire. Like Anzai Parking, the Mangats took the position after the expiration of their purchase and sale agreement

that they were named as the applicant in the Trombley Heights subdivision application and asserted that they were the only party who could control the rights under the application. Like the City Attorney in Anzai, the Snohomish County Prosecutor advised the County's Planning Department and the Mangats that the application for the subdivision was in rem in nature and that the owners of the property held the rights under the application. Like the court in Anzai, this court will find that there are no court decisions which are contrary to the Snohomish Prosecutor's determination or which support the position of Mangats that an application to subdivide land may be held separate from any interest in the property to be subdivided.

Indeed, appellants do not cite a single case or legal authority to support their position that a party to a subdivision application retains rights or ownership in the application after the party has lost all rights to the subject property. Rather, the appellant engages in a tortured analysis of RCW 58.17.033 to argue that the Legislature conferred vested rights upon a special class of subdivision applicants when it adopted this statute. RCW 58.17.033 simply states:

> (1) A proposed division of land, as defined in RCW 58.17.020, shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully

> completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted to the appropriate county, city, or town official.
>
> (2) The requirements for a fully completed application shall be defined by local ordinance.
>
> (3) The limitations imposed by this section shall not restrict conditions imposed under Chapter 43.21C RCW.

The appellant argues that since the statute does not define who is to be benefited by it, the statute is ambiguous and resort to its legislative history is appropriate. (*Appellant's Opening Brief* at 18.) The Appellant's then cite one sentence in the "Background" section of a legislative report which describes the vested rights doctrine and uses word "developer". Because of this use of the word "developer", the appellant concludes that the Legislature intended to benefit the developer, not the underlying land owner (*Appellant's Opening Brief* at 20) in its adoption of RCW 58.17.033.

The appellants attempt to read into the statute special rights conferred upon applicants and not property owners must fail for two reasons. First, the statute is not ambiguous. In clear language, it simply adds a rule to the processing of subdivisions under Chapter 58.17 RCW. An express purpose of Chapter 58.17 is to establish a "uniform manner by cities, towns and counties throughout the state" for the dividing of land.

RCW 58.17.010. Indeed, the legislative purpose identified in RCW 58.17.010 focuses on the promotion of "public health, safety and general welfare" and makes no reference to conferring benefits upon any class of individuals. Thus, there was no need for the Legislature to identify the individuals who would be benefited by RCW 58.17.033. In adopting this section, the Legislature simply added another rule for the subdividing of land which would apply throughout the state.

Second, there is no reason to believe that the Legislature intended RCW 58.17.033 to confer special benefits upon applicants who are developers, but not owners of the property. The single reference to "developer" by in the legislative staff report cited by the appellants is merely a description of a holding in prior case law on vested rights in building permit applications. The reference applies equally to developers who are owners of the property and developers who merely have the right to purchase the property in the future. It does not follow from this reference that the Legislature created personal rights to a certain class of developers in its adoption of RCW 58.17.033. Rather, the Legislature adopted a clearly worded vesting rule governing all applications for the subdivision of land, whether they are submitted by the current owner of the land or a party holding the right to purchase the land in the future. Moreover, the vesting provision must be read in conjunction with RCW

58.17.165 which requires the written certification of the owner of the property upon the final plat being recorded, and one must conclude that the Legislature understood that owners would be involved in the application for a subdivision of land. There is no logical reason to conclude that in adopting RCW 58.17.033 the Legislature created special vesting rights to be held by applicants as personal rights detached from the land being divided.

In the last analysis, the vested rights in the application for the subdivision of the land owned by the Dankers and Mr. Gallo is statutory. Discourse in *Appellant's Opening Brief* about the constitutional basis for the vested rights doctrine annunciated in court decisions in this state is quite irrelevant to the issues in this case. As appellants recognized in their brief, the courts in this state never applied the vested rights doctrine to the subdivision of land. Rather, the Legislature has stepped forward to establish the statutory requirement that subdivisions of land shall be considered under the zoning and land use control ordinances in effect at the time a fully completed application for subdivision is submitted. In this case, there is simply a statutory requirement that the application for the subdivision of the property owned by the Dankers and Mr. Gallo be considered under the zoning ordinances in effect at the time the application was deemed complete under the Snohomish County rules. The

statute does not create a "vested right" held in the name of the Mangats which existed separate and apart from the property of the Dankers and Mr. Gallo and the legal process for dividing that property.

Appellants also fabricate out of whole cloth the theory that the vested rights of a subdivision application do not attach to the subject property until the local jurisdiction gives preliminary plat approval of the application. Appellants argue that the vested rights in a subdivision application float as personal rights of the applicant to be assigned and governed by the applicant's whim until the moment of preliminary approval of the subdivision, when they then attach to the real property. The appellants postulated that the subdivision process is not in rem until there is preliminary plat approval. The appellants offer no authority for this theory except a quote from a 1974 treatise on conflicts of law and an irrelevant citation to King Count v. Lesh, 24 Wn.2d 414, 165 P.2d 999 (1946), in which the court invalidated a tax foreclosure decree because of an inadequate legal description.

In reality, their argument ignores the accepted definition of an in rem proceeding:

> A technical term used to designate proceedings or actions instituted *against the thing*, in contradistinction to personal actions, which are said to be in personam.
>
> An "action in rem" is a proceeding that takes no cognizance of owner but determines right in specific

> property against all of the world, equally binding on everyone. Flesch v. Circle City Excavating & Rental Corp., 137 Ind.App. 695, 210 N.E.2d 865, 868. Black's Law Dictionary, Fifth Edition (1979), p. 713.

The process of subdividing property is inherently an in rem proceeding. The central issue in a subdivision application is whether the proposed division of land will comply with all applicable land use regulations and subdivision requirements. The personalities, qualifications, conduct, experience and skills of the owners of the property are irrelevant to the determination of whether the property may be divided as proposed. Indeed, the identity of the owners of the property may change several times during the time a subdivision application is under consideration without changing the issues before the local jurisdiction on whether the proposed division of land meets its requirements.

By contrast an in personam proceeding is linked entirely to jurisdiction over the person against whom a remedy is sought and is defined as:

> Against the person. Action seeking judgment against a person involving his personal rights and based on jurisdiction of his person, as distinguished from a judgment against property *(i.e.* in rem). Type of jurisdiction of power which a court may acquire over the defendant himself in contrast to jurisdiction over his property. Black's Law Dictionary, Fifth Edition, (1979), p. 711.

There is simply no basis for the appellant's theory that an application for subdivision of land begins as an in personam proceeding and then is converted to an in rem proceeding only after preliminary approval of the application. The issue before posed to the planning staff and before the hearing examiner by a subdivision application is whether the proposed division of land meets zoning and subdivision regulations. It has nothing to do with the person of the applicant. At a hearing on a subdivision application, the hearing examiner has jurisdiction to deny the application and to place conditions on its approval. However, the hearing examiner does not have jurisdiction to impose personal liability or sanctions upon the applicant. From beginning to end, the review and approval (or denial) of a proposed division of land is in rem. RCW 58.17.033 reflects the in rem nature of the subdivision process when it begins with the phrase:

> A proposed division of land shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully completed application... has been submitted....

Simply stated, the statute addresses how a proposed division of a tract of land will be considered. It does not make any reference to the owners or the party submitting the land or any party who may obtain an interest in the land during the course of consideration of the application. It

is strictly a rule applied to the proceeding and what ordinances are to be considered in it. That proceeding under Chapter 58.17 RCW is in rem in nature. Therefore, the County and the trial court were on completely solid ground in determining that the application for the subdivision of the Dankers and Gallo properties was in rem and should follow the ownership of the property.

3. A ruling that the application for subdivision of land runs with the ownership of the property is not only justified by existing case law and statutes but also by sound public policy. The policy that ties permits and subdivisions to the ownership of land (1) makes the best use of the time of the agency considering the matter and the public's time in commenting on it and (2) avoids the abuses which may arise if permits and applications for subdivisions were held by outside parties. The subdivision process, like many land use permit processes, is a process which consumes the staff time of local governments and invites members of the public to commit their time and efforts to submitting comments and testifying at a hearing about the proposed development. It makes little sense to gear up this public process if the applicant cannot complete the requested subdivision of land. After they defaulted on their contract, the Mangats did not have the capability of recording a final plat, since it would have required the written consent of the Dankers and Mr. Gallo. It

would have been futile for the County to take direction from them concerning the further processing of the Trombley Heights plat.

A system which allowed applicants to retain control of an application for a permit or subdivision would be difficult to administer and open to abuse. Under a system where applications for permits and subdivisions are tied to the subject property, the local jurisdiction may refer to title records to determine who they may pursue the application or exercise the relevant permit rights. However, if the application or permit is the personal property of the party initially making the application, then the local jurisdiction must inquire about and assess the validity of the assignment of those rights before it may act on an application or permit. Not only would such a system create additional work for the local jurisdiction, but it would open the door to economic blackmail and abuses of the system. For example, it is not uncommon for a contractor to apply for a building permit on behalf of the property owner for whom he is building a home. If the contractor "owns" the permit then he may be able to extract economic concessions from the homeowner if he is dismissed from the job and the homeowner is faced with cost and delay of obtaining a permit in the homeowner's name. Moreover, it would not be sufficient to presume that a deed conveys rights under a permit or subdivision application. If the closing documents did not include a separate

assignment of rights under subdivision application, an unwary buyer could be forced to buy the subdivision application after paying the purchase price of the property. The potential for mischief, scams and unintended consequences would be large under a system where ownership of a land use permit or subdivision application is held as personal property by the applicant or his assignee and independent of any interest in the subject land.

4. There remain alternate grounds for affirming the trial court's granting of the summary judgment motion of Gallo and Dankers. If the Court of Appeals should reverse the trial court's ruling on the cross motions of the Mangats and Snohomish County, there remain three alternative grounds for affirming the trial court's dismissal of the Dankers and Mr. Gallo from the lawsuit on their motion for summary judgment.

A. First, the Mangats claim against the Dankers and Mr. Gallo for injunctive relief should be dismissed as barred by the Doctrine of Laches. The Dankers and Mr. Gallo raised this defense in their pleadings and motion for summary judgment. The Doctrine of Laches bars a party from obtaining equitable relief where the party has unreasonably delayed bringing an action for equitable relief and during the delay where the other party has changed its position to its detriment.

As the Court in Davidson v. State, 116 Wash.2d 13, 25, 802 P.2d 1374 (1991) states, the elements of the doctrine of laches are:

> (1) knowledge by plaintiffs of the facts constituting their cause of action or a reasonable opportunity to discover such facts; (2) unreasonable delay in commencing the action; and (3) damages to the defendant resulting from the delay. *Id* at 25.

In February, 2010, the Mangats were fully aware of the efforts being undertaken by the Dankers and Mr. Gallo to continue to process the subdivision application. They attempted to convince the planning staff at Snohomish County that the property owners could not proceed with the application. At least by the time of their receipt of the letter from Bree Urban, the Snohomish County Deputy Prosecuting Attorney, dated February 22, 2010, [CP 214 (letter from Snohomish County Prosecuting Attorney to Thom Gaafstra)] they were on notice that the County intended to allow the property owners to proceed forward with the application. CP 196-197 (Declaration of Harbhajan Mangat). They could have sought injunctive relief at that time, but did not elect to do so. They have no excuse for their 14 month delay in seeking injunctive relief.

In the ensuing 14 months, the Dankers and Mr. Gallo expended $18,000 in fees on consultants, engineers and surveyors to redesign the plat proposal and provide the additional information requested by planning

staff to perfect the application. The Dankers and Mr. Gallo expended a great deal of time and money to advance their application so that planning department staff could recommend its approval in accordance with County standards. In short, while the plaintiffs slept on their rights, the Dankers and Mr. Gallo devoted more than a year's worth of effort and considerable moneys to bring the subdivision application to a point where its approval was recommended by the staff and a hearing on the preliminary approval could be set before the hearing examiner. The Mangat's sinister strategy of waiting until 3 court days before the hearing on the recommended approval of the subdivision to seek a temporary restraining order has exposed the Dankers and Mr. Gallo to considerable damage. Such behavior should not be tolerated from parties seeking equitable relief and under the Doctrine of Laches. The Mangats unexcused delays commencing this action provides grounds for dismissal of the injunctive relief they seek.

B. Alternatively, the Court may dismiss the appellants' claims for injunctive relief because an injunction would not benefit the plaintiffs, but would impose serious hardship and harm upon the defendants. Before issuing an injunction, the courts weigh the equities to determine if an injunction is necessary to avoid serious harm to the party seeking the injunction and if an injunction will not cause greater

hardship upon the party against which it is entered. The three well-recognized criteria for issuance of an injunction are that the party seeking relief (1) has a clear legal or equitable light, (2) that he has a well-grounded fear of eminent invasion of that light and (3) that the acts complained of will result in actual and substantial injury to him. Port of Seattle v. International Longshoremen's Union, 52 Wn.2d 317, 319, 324 P.2d 1099 (1958). As the Court stated in Tyler Pipe Industries, Inc. v. State of Washington Department of Revenue, 396 Wn.2d 785, 638 P.2d 1231 (1982)

> An injunction is an extraordinary equitable remedy designed to prevent serious harm. Its purpose is not to protect the plaintiff from mere inconvenience or speculative or insubstantial injury, *Id* at 796.

In this case, the appellants' injury from approval of the subdivision application is, at best, a "speculative and insubstantial injury". Indeed, we submit their injury from the final approval of this subdivision is non-existent, since the plaintiffs have no property in the area and will experience no impacts from the subdivision of this property.

Conversely, it is appropriate for the court to deny entry of an injunction where there is evidence that considerable hardship would be imposed on the party against whom the injunction was issued, but no appreciable harm or damage would flow to the other party from denial

of the injunction. Brown v. Voss, 105 Wn.2d 366. In Brown v. Voss, the plaintiffs had a road easement over the defendant's property. The defendants placed logs and a chain linked fence across the easement and blocked the plaintiff's use of the easement on the grounds that the plaintiffs were building a house which would be partially located on their Parcel B, which was benefited by the easement, and partially on their Parcel C which was not benefited by the easement. The plaintiffs brought an action to stop the interference with their easement, and defendants counter-claimed for damage and an injunction against the plaintiffs using the easement for any improvements on Parcel C. The trial court found that use of the easement road to serve a single-family residence straddling Parcels B and C did not increase traffic or otherwise negatively impact the defendants more than the traffic and impacts from a house built entirely on Parcel B. The court further found that the plaintiffs had expended more than $11,000 on their construction project before the defendant objected to the use of the easement and that the defendants counterclaim was an effort to gain "leverage" against the plaintiffs. The court acknowledged that under legal principles the plaintiff did not have the right to extend their easement benefiting Parcel B to benefit Parcel C. However, the court declined to enter an injunction because it found the plaintiffs would suffer considerable hardship if the

injunction were granted, whereas no appreciable hardship or damages would follow the defendants if it were denied.

The dynamics in the case before the Court is very similar to those in Brown v. Voss. The appellants filed a lawsuit against the Dankers and Mr. Gallo in 2010 for money damages on a theory of unjust enrichment arising from their processing of the subdivision application begun by the appellants. The preliminary injunction they sought just before the hearing on Trombley Heights plat approval in May, 2011 appeared to seek "leverage" on Dankers and Gallo to settle the monetary claim of the appellants. The appellants will experience no appreciable hardship from the Court's denial of the injunction they seek. However, the Dankers and Mr. Gallo would suffer considerable hardship if an injunction were granted. Under these circumstances, it is appropriate for a court sitting in equity to deny the injunctive relief requested.

C. Should the Court of Appeals reverse the trial court's denial of appellants' motion for partial summary judgment, the appellant's cause of action for enjoining the subdivision of the Dankers and Mr. Gallo property should be dismissed, because the appellants have made an election of remedies. The doctrine of elections of remedies has long been recognized as a bar to double recovery by plaintiffs. The court in

Stryken v. Panell, 66 Wash. App. 566 (1992) provided the following succinct statement of the doctrine of election of remedies:

> One is bound by an election of remedies when all of the three essential conditions are present: (1) the existence of two or more remedies at the time of the election; (2) inconsistency between such remedies; and (3) a choice of one of them... The prosecution to final judgment of any one of the remedies constitutes a bar to the others. *Id* at 571.

In Stryken, the real estate purchaser, Paul Stryken; sought damages and alternatively recission for the seller's breach of contract. The trial court found in Stryken's favor and ordered recission. On appeal, Stryken sought to change the trial court's award to money damages for breach of contract. The Court of Appeals ruled:

> Because Stryken elected to plead for an equitable remedy as well as a legal remedy, he is now bound by the trial court's election between the remedies prayed for in the complaint. *Id.*

The Mangats claims against Snohomish County for damages for a taking are inconsistent with their claims for an injunction prohibiting the County and Dankers and Mr. Gallo from completing the subdivision of Trombley Heights. To establish their taking claim, the Mangats assert as a matter of law that they had a valuable right which the County has taken from them without compensation. To obtain an injunction, the Mangats must assert and prove that they currently have valuable rights

which they will lose if the court does not enjoin the conduct which will cause them to lose those rights. Since the Mangats assert that they have already lost those rights to a taking, there is no longer any grounds for the court to issue an injunction which would bar the Dankers and Mr. Gallo from obtaining final approval of their subdivision and recording the subdivision. Moreover, the Mangats would enjoy a double recovery if they recover money damages against the County for a taking and an injunction. If the court grants their motion for partial summary judgment establishing the liability of the County for a taking of their property, they will be entitled to money damages and the only remaining issue in the case will be the court's determination of the amount of their judgment for damages. As in Stryken, the court's partial summary judgment would constitute an election of remedies by the court at the appellants' request and would be binding upon them. In such an event, appellants may not continue to pursue a double recovery through issuance of an injunction against Dankers, Gallo and the County. Thus, should the Court of Appeals rule that the Appellants' motion for partial summary judgment is granted, it should affirm the trial court's granting of the motion for summary judgment by Dankers and Gallo and its order dismissing appellants' requests for injunctive relief.

5. <u>Appellants improperly raise issues on appeal which were not addressed in their pleadings or in the motions before the trial court</u>. They should be disregarded in this appeal pursuant to RAP 2.5(a). Beginning on Page 33 of the *Opening Brief*, the appellants say that the application for the subdivision of the Dankers and Gallo property expired and suggest that the County acted improperly in either reviving the application or "backdating" the vesting rights under that application. Such issues were not raised in the plaintiff's pleadings in this action nor were they raised in their motion for summary judgment. These issues and the implied request for relief to the Court of Appeals were not before the trial court and have been raised for the first time in *Appellant's Opening Brief.* Appellants' pleadings and motion for partial summary judgment gave no notice to Dankers and Gallo that these issues were the subject of determination before the trial court and they had no opportunity to present relevant facts concerning their dealings with the County and timely processing at the pending application. Thus, the record on the issues raised in *Appellants' Opening Brief* is scant and inadequate. Nor were these issues raised and briefed before the trial court or ruled upon by the trial court. As a general rule, an appellate court will not review matters on which the trial court did not rule. <u>Meresse v. Stelma</u>, 100 Wa. App. 857 (2000). It is improper for

appellants to now introduce new issues into this case and suggest the Court of Appeals rule on whether the County improperly backdated vested rights or revived an expired application. There may be some obtuse relation between such suggestions in the *Opening Brief* and appellants' argument for reversing the trial court's orders on the cross motions for summary judgment, but to the extent these suggestions raise new issues for the first time on appeal for determination by this Court, they should be disregarded.

VI. CONCLUSION

A subdivision application is merely a request for local governmental approval to divide a specific property in conformance with state and local laws. The subdivision application of the Dankers and Gallo properties was begun by the Mangats as part of the requirements of their purchase agreements which gave them to a valuable opportunity in an appreciating real estate market to tie up the property at a fixed price for up to 14 months. This purchase contract also required that in the event of their default they would turn over to the seller all the maps, drawings, studies, reports and other documents related to the plans for developing the property. The clear intent of the parties was to provide for the continuous and prompt processing of the subdivision application and the ability of the sellers to continue with the subdivision and development of

the property in the event of the Mangat's default. Thus, by the terms of their contracts, the Mangats lost their right to purchase and rights to all the documents related to the subdivision upon their default. Following their default, they had nothing left to "take". Their loss of rights in the property was not the result of any taking, but the result of their own failure to carry out their purchase at closing.

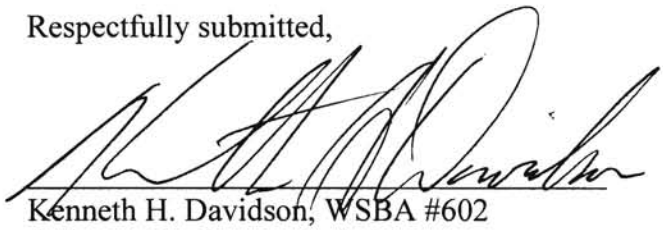
The appellants make up from whole cloth the "vested rights" they assert. The statute which establishes vesting rules for applications for subdivisions creates no special rights for the applicants, which exist separate and apart from ownership of the land being divided. The County followed the logical extension of case law and the best public policy when it considered the subdivision process to be in rem and allowed the property owners to continue to process the pending application for the subdivision of their land. The trial court was correct in granting the motions of Dankers and Gallo and of Snohomish County for summary judgment and its decision should be affirmed.

In the event the Court of Appeals should reverse the trial court's denial of appellants' motion for partial summary judgment and granting of Snohomish County's motion for summary judgment, it should nevertheless affirm the trial court's dismissal of appellants' claims for injunctive and declaratory relief against Dankers and Gallo on the grounds

that such relief is barred by the Doctrine of Election of Remedies, by the Doctrine of Laches and/or by the appellants' inability to show actual and substantial harm caused by final approval of the subdivision of the Dankers and Gallo property.

DATED this 4th day of April, 2012

Respectfully submitted,



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No. 67712-8-I

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

In the Matter of

KHUSHDEV MANGAT, et ux.,
Appellants

vs.

SNOHOMISH COUNTY, et al.,
Respondents/Appellees

APPEAL FROM SUPERIOR COURT
FOR SNOHOMISH COUNTY

DECLARATION OF SERVICE

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

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

Dated: April 4, 2012, at Kirkland, Washington.

Abigail A. Landes