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Case No. 89378-1

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THE SUPREME COURT OF THE
STATE OF WASHINGTON

In the Matter of

KHUSHDEV MANGAT and HARBHAJAN MANGAT, and the Marital
Community composed thereof,

Petitioners

v.

SNOHOMISH COUNTY, a political subdivision of the State of
Washington; LUIGI GALLO, a single man, and
JOHANNES DANKERS and MARTHA DANKERS, and the Marital
Community composed thereof,

Respondents

ANSWER OF RESPONDENTS GALLO AND DANKERS TO
PETITION FOR REVIEW

SENT ON OCTOBER 17, 2013 VIA E-MAIL
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COURT OF THE STATE OF WASHINGTON.

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I. IDENTITY OF RESPONDENTS

Respondents Luigi Gallo (Gallo) and Johannes Dankers and Martha Dankers (Dankers) filed this answer in response to the Petition for Discretionary Review filed by petitioners, Khushdev Mangat and Harbhajan Mangat (Mangats).

II. STATEMENT OF THE CASE

The petition for review in this matter arises out of the Mangats undisputed breach of their contracts to purchase two adjoining tracts of land owned by Gallo and Dankers. The petitioners' purchase agreements with the respondents contained identical addendums governing the Mangats' rights and duties in making application to subdivide the property prior to the closing of the sale. The addendums contained clear and unambiguous provisions that in the event of their default under the agreement, the Mangats were required to turn over all materials related to the plat application to the Dankers and Gallo.

The closing date for the Mangats' purchase of the properties was extended by mutual agreement to December 16, 2009. CP 196 (Declaration of Harbhajan Mangat p. 2) and CP 631 (Declaration of Johannes Dankers p. 3). It is undisputed that the Mangats were unable to secure financing for their acquisition and defaulted under their contracts with Gallo and Dankers by failing to complete their purchase on December 16, 2009. CP 631 (Declaration of Johannes Dankers).

In the month following Mangats' default, Mr. Gallo met with Snohomish County planners to continue the plat application process started by the Mangats. Through their lawyer, the Mangats raised objection to the continuation of the subdivision process by Gallo and Dankers, claiming that the Mangats "owned" the application. The Snohomish County Prosecutor's Office sent a reply explaining that the County recognized the rights of the property owner to continue the plat application process after the expiration of the Mangats purchase rights. CP 214-215 (Exhibit 2 to Declaration of Harbhajan Mangat). Over the next 14 months, Gallo and Dankers retained and paid for a team of consultants and engineers to address outstanding problems and issues the County had identified with the proposed subdivision. They eventually won a favorable recommendation by the County staff for approval of the plat application with conditions. A hearing on preliminary plat approval was set before the hearing examiner on April 12, 2011. CP 683, 698-707 (Declaration of Ry McDuffy).

On March 22, 2011, the Mangats filed their lawsuit against Gallo, Dankers and Snohomish County seeking to enjoin the approval of the plat application. Without any notice to the defendants, the Mangats obtained an ex-parte temporary restraining order (TRO) from a court commissioner restraining the hearing examiner from holding the pending hearing. CP 568 (Declaration of Mary Sakaguchi). While Gallo and Dankers were

successful in quashing the TRO and obtaining sanctions against the attorney who improperly obtained it, the service of the TRO on the hearing examiner resulted in the striking of the hearing and then upon entry of the order quashing it, the rescheduling of the hearing to May 11, 2013. CP 570 (Declaration of Mary Sakaguchi).

The Mangats' motion for a preliminary injunction staying the proceedings on the plat application was heard on May 3, 2011. After considering the pleadings, declarations and briefs submitted and oral argument, the court denied the motion for a preliminary injunction.

On May 11, the hearing examiner held a hearing on the plat application. On May 17, the hearing examiner entered her decision granting approval of the subdivision of the Gallo and Dankers property with conditions. CP 254-269 (Decision of Snohomish County Hearing Examiner). The Mangats appealed that decision to the Snohomish County Council. The Dankers and Gallo moved for dismissal of the appeal and the Council dismissed the appeal on June 15, 2011. CP 327-329 (County Council Dismissal).

In July, the County, Gallo and Dankers joined in a motion for summary judgment to dismiss the Mangats' complaint. The Mangats filed a cross-motion for partial summary judgment for an order establishing the County's liability for damages for the "taking" of their rights without compensation. On August 17, 2011, Judge Kurtz granted the motions for

summary judgment brought by the County, Dankers and Gallo, denied Mangats' cross-motion and dismissed the case. The Mangats appealed that order. In an unanimous opinion filed on August 26, 2013, the Court of Appeals affirmed the trial court's decision.

The petition for review before the Court involves the second of three lawsuits the Mangats brought against Gallo and Dankers in an apparent attempt to extract a monetary settlement. In their first lawsuit against Gallo and Dankers, the Mangats sought a monetary judgment on claims of unjust enrichment. Faced with threats of CR 11 sanctions, the Mangats voluntarily dismissed that lawsuit. Their third lawsuit was commenced shortly after the Snohomish County Council dismissed their appeal of the hearing examiner's decision. In their third lawsuit they sought an appeal of the hearing examiner's decision under the Land Use Petition Act, writs of mandamus and prohibition against the County to prevent further processing of the subdivision of the Gallo's and Dankers' properties and money judgment against the County under Chapter 64.40 RCW. Their third lawsuit was also dismissed on motions. The Mangats appealed the order dismissing their third lawsuit. The Court of Appeals also affirmed the trial court's dismissal of the third lawsuit under Washington Court of Appeals Cause No. 68739-5-I. The Mangats have petitioned the Washington State Supreme Court for discretionary review

of the Court of Appeals decision the third lawsuit, which is pending under Supreme Court Cause No. 89332-2.

III. ARGUMENT

This case does not meet any of the criteria set forth in RAP 13.4(b) for acceptance for discretionary review by the Supreme Court. Simply stated, this case involves contractual consequences to a buyer under a real estate purchase and sale agreement. It does not involve a significant question of constitution law or an issue of substantial public importance that should be determined by the Supreme Court. Nor does the Court of Appeals decision in this case conflict with any other decision of the Court of Appeals or the Supreme Court.

It was an undisputed fact before the trial court at its hearing on cross-motions for summary judgment that the Mangats had defaulted under the terms of their purchase agreements to acquire the Dankers' and Gallo's property by failing to complete their purchase by the December 16, 2009 closing date. It was also undisputed that the purchase agreements with Dankers and Gallo contained the following provision that, in the event of default, the work product of the Mangats' experts, consultants and engineers would be turned over to Gallo Dankers:

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).

It was also undisputed that the above provision was negotiated by Dankers and Gallo to put them in a position to complete the subdivision process in the event the Mangats defaulted. CP 630 (Declaration of Johannes Dankers). The application the Mangats had submitted for the subdivision of the Gallo and Dankers' property consisted entirely of the proposed plat map, reports, studies and other written documents prepared by the Mangats' engineers, surveyors and other experts and consultants. Thus, by the terms of the contract all those documents in the subdivision application were to be turned over to the property owners upon the Mangats' default.

In their complaint in this action, the Mangats sought to enjoin the further processing of the application for the subdivision of the Gallo and Dankers' property on the grounds that they "owned" the application, despite the foregoing contract provisions. They alleged that imminent injury to their rights would occur if the court did not enjoin the County and Gallo and Dankers from the further processing of the application. In its order denying the Mangats' motion for a preliminary injunction, the trial court succinctly identified the fatal flaw in the plaintiff's complaint when it found:

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 560-63 (Order Denying Motion For Preliminary Injunction).

Since the Mangats did not own a property right or interest which was in jeopardy, there was no basis for the issuance of an injunction, and the Mangats' complaint seeking to enjoin the further subdivision of the Gallo and Dankers' property was appropriately dismissed.

Having lost their motion for a preliminary injunction, the Mangats turned their attention to their alternate claim of relief, namely their claim for monetary damages against the County for "taking" of their property interest without just compensation. Thus, their cross motion for partial summary judgment focused on the County's liability for damages to the Mangats for an uncompensated "taking". However, their "taking" claim for damages suffered the same problem as their claim for injunctive relief. They lost their right to purchase the property and their rights to the documents containing the application for the subdivision of the property

because of their own default under the purchase agreement, not as a result of any “taking” by the County. Following their default there was, as Judge Leach found, “nothing left for them to own” and nothing left for the County to “take”. In their petition for review, the Mangats’ counsel may wax eloquently about the constitutional underpinnings of a “taking” claim, but the dismissal of the Mangats’ case has nothing to do with interpretation of constitutional law. Rather, the dismissal of the complaint is compelled by the fact that the Mangats held no property interest or right which the County had taken.

On appeal, the Mangats offered novel theories on why they “owned” the right to control the application for the subdivision for the Gallo’s and Dankers’ property, notwithstanding their lack of any interest in the real property. They argued that RCW 58.17.033(1) and Snohomish County code chapter 30.70 conferred rights upon them as the applicant, which were separate and apart from their purchase interest in the property. RCW 58.17.033(1) states:

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.

The Mangats argued that the statute is ambiguous because it does not define the party who may receive benefits under the statute. Because of this alleged ambiguity, the Mangats argued the court should apply rules of statutory interpretation and review the legislative history. They argued the legislative history would show that the legislature's intent was to grant only the permit applicants the vested rights under this statute. The Court of Appeals disagreed that the statute is ambiguous and declined the Mangats' request that they add to RCW 58.17.033(1) a rule that rights associated with the application attached, upon filing, to a particular person or entity.

Similarly, the Mangats argued that the repeated use of the word "applicant" in Chapter 30.70 of the Snohomish County Code revealed an intent of the Snohomish County Council to confer ownership rights to an application upon the applicant, regardless of whether the applicant held an interest in the real property being subdivided. The Mangats cited no legal authority to support the conclusion they urged from this argument. The Court of Appeals found that there was nothing in Chapter 30.70 SCC which provides that persons who file a permit application are given some kind of ownership interest in the application. Thus, with respect to the Mangats' claims of a property right based on RCW 58.17.033(1) and SCC 30.70, the Court of Appeals found no legal basis for recognizing an ownership interest in an application to subdivide land, which resides in the

name of the applicant to the exclusion of the parties who own the land. The Court of Appeals disposition of Mangats' theories on this topic involved well established rules of statutory interpretation and do not involve issues of constitutional law or a substantial public interest which would justify discretionary review under RAP 13.4(b).

On appeal the Mangats also offered a theory that rights to a development permit do not attach to the land until the permit is actually approved. Under this theory, the Mangats argued that the right to process the application did not belong to the owner of the property, but rather the person named as the applicant. The Mangats propose a bazaar world in which vested rights under a subdivision application would float as personal rights of the person named as the applicant until the moment of preliminary approval of the plat, when they then attach to the real property and thereafter be held by the owner of the real property. The Mangats cited no authority to support their theory that for this interim period an application could be owned, assigned and potentially directed by a person who has no interest in the real property being subdivided. The Court of Appeals properly declined to adopt this imaginative, but unsupported legal theory.

In their petition, the Mangats seek to create the appearance of the presence of substantial public interest by portraying their action as one to prevent the public harm arising from their alleged errors in the vesting

date used by the County in the preliminary approval of the subdivision of the Gallo and Dankers' property. Hence, they engage in discussion on the development of the vested rights doctrine, its constitutional origins and the balancing of the public's interest to avoid nonconforming uses against the property owner's interest in certainty and due process. They at least imply that they represent the public interest which was not adequately weighed by the Court of Appeals.

However, the Mangat's complaint in this action is limited solely to the Mangats' personal claim to own the application and their request for an injunction to prevent imminent injury to this property interest or, alternatively, for damages against the County for the uncompensated "taking" of that interest. No where in their complaint do they assert that they are acting as representatives of the public seeking to protect the public interest. On appeal, the Mangats raised arguments concerning whether the County had used the correct vesting date in the preliminary approval of the subdivision of the Dankers and Gallo property. Pursuant to RAP 2.5(a) the Court of Appeals properly declined to consider these arguments, because the issues were not raised in the Mangats' pleadings before the trial court, but instead were raised for the first time on appeal. Similarly, the Mangats cannot bootstrap their way into establishing an issue of substantial public interest to satisfy RAP 13.4(b) by claiming to

represent a public interest, when no such public interest claim was set forth in their complaint.

Finally, the Mangats suggest that an issue of substantial public interest is present in this case, because the Court of Appeals' published opinion may influence outcomes in similar situations. Of course, every published decision of the Court of Appeals may provide guidance to lawyers in advising their clients and to trial courts in deciding cases. We submit that to satisfy the requirements of RAP 13.4(b)(4) one must point to more than the potential precedential impact of a decision to establish the involvement of an issue of substantial public importance. In its opinion, the Court of Appeals acknowledges with favor the point raised by the respondents that the appellate courts have consistently held that zoning and permit rights run with the land, not with the person applying for the permits. This dictum may provide guidance in other cases. However, the Court of Appeals holding in this case turns on the contractual relation between the Mangats and Dankers and Gallo. In its opinion the court stated:

The threshold question that must be answered here is whether the Mangats had any property interest in the plat application. We hold they did not.

Here, whatever interest the Mangats had in the Danker's and Gallo's properties was extinguished when they defaulted on the purchase and sale agreements. It is undisputed that after an extension of the closing date required by the purchase and sale agreements. It is undisputed that after an extension of the closing date required by the purchase and sale

agreements, the Mangats were to complete the purchase by December 16, 2009. It is also undisputed that the purchase and sale agreements “expired” without the Mangats purchasing the property after their lender declined to advance them a development loan. It is further undisputed that after the Mangats failed to complete the purchase, the terms of the agreement required them give the Dankers and Gallo all documents related to the subdivision of the property, and permitted Dankers and Gallo to proceed with obtaining approval of the plat application.

In other words, as of December 16, 2009, the Mangats had no interest, prospective or otherwise, in the Dankers’ or Gallo’s properties. [emphasis added]. Published Opinion Court of Appeals Cause No. 67712-8 at pages 9 and 10, attached is Exhibit A to Petition for Discretionary Review herein.

This holding deals with the particular facts of this case and does not touch upon “an issue of substantial public interest” as required under RAP 13.4(b)(4).

IV. CONCLUSION

Since the criteria in RAP 13.4 have not been met by the petition for discretionary review filed herein, the petition should be denied.

Dated this 17th day of October, 2013.

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Please find attached, for filing with the Washington Supreme Court, Answer of Respondents and Declaration of Service in the following matter:

Khushdev Mangat and Harbhajan Mangat v. Snohomish County, et al
Cause No. 89378-1

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