No. 99236-3

THE SUPREME COURT
OF THE STATE OF WASHINGTON

NOCHE VISTA, LLC, a Washington limited liability company,

Petitioner,

v.

BANDERA AT BEAR MOUNTAIN RANCH HOMEOWNERS ASSOCIATION, a Washington nonprofit corporation,

Respondent.

BANDERA AT BEAR MOUNTAIN RANCH HOMEOWNERS ASSOCIATION'S RESPONSE TO AMICI CURIAE'S MEMORANDUM IN SUPPORT OF GRANTING REVIEW

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A. INTRODUCTION

The North Central Washington Association of REALTORS® and Building North Central Washington (collectively, "Amici") should not be troubled by Division III's opinion in Noche Vista LLC v. Bandera at Bear Mountain Ranch Homeowners Association, 14 Wn. App.2d 1021 (2020)(unpublished opinion).

Division III correctly applied fundamental principles of real property law to the unique terms of Jerry Scofield's covenants and his seven amendments thereto (the "CCRs"). It correctly ruled that the CCR's encumber all 92.06 acres in Mr. Scofield's multi-phase, residential subdivision known as Bandera at Bear Mountain Ranch ("Bandera"). Like the trial court before it, the Court of Appeals ruled the CCR's encumbered Noche Vista's 31.76 acres that the CCRs described as Bandera Phase III.

B. IDENTITY AND INTERESTS OF AMICI

Claiming to represent builders and realtors, Amici speculate on what lenders want. They imagine that lenders want to acquire a borrower's reserved developer rights when lenders accept a deed in lieu to acquire a borrower's title to pledged real property. Citing no authority,

Amici wrongly assume lenders want to act as their borrower's successor developer.

Further, Amici fail to address the omission of any expression of intent by Mr. Scofield or his lender to secure Mr. Scofield's loan with his reserved developer rights in Bandera, or why Mr. Scofield's transfer of Bandera Phase III to his lender would give that lender developer rights over all three phases of Mr. Scofield's development. Regardless, Amici assert that developer rights should automatically run with the land even when developer rights were (i) never pledged, (ii) never referenced in the deed in lieu, or (iii) when the borrower is surrendering to its lender only one phase of a multi-phase development.

C. STATEMENT OF THE CASE

In its opinion, Division III provided an excellent summary of the key facts at issue in this case. These key facts are summaries are follows.

In 2006, Mr. Scofield created a 92.06-acre multi-phased, planned, residential subdivision known as Bandera at Bear Mountain Ranch. This 92.06 acres included the 31.76 acres that make up Bandera Phase III. Noche Vista, at *1.

Mr. Scofield affiliated Bandera with his neighboring planned community totaling 1,500 acres known as Bear Mountain Ranch. Id. at *8.

In Bandera's CCRs, Mr. Scofield reserved the right to further develop, associate, and tie together Bandera's three phases with Bear Mountain Ranch. According to Noche Vista, the CCRs demonstrate Mr. Scofield's intent to retain for himself maximum developer flexibility. Id. at *7.

In the CCRs, Mr. Scofield also reserved from himself developer rights, encumbering the title to all land in Bandera with these reserved rights. Id. at *1. The CCRs provided Mr. Scofield or his specifically designated successor developer a 35 year period to develop Bandra and Bear Mountain Ranch. Id. at *6. While not quoted in Division III's opinion, Mr. Scofield's CCRs require he specifically designate his successor developer without a specific designation, there would be no assignment of Mr. Scofield's developer rights. The CCRs read:

> 12.13 Declarant's Successor. For the purpose of the Declaration and the easements, dedications, rights, privileges and reservations set forth herein, a successor and assign of Declarant is deemed a successor Declarant and assign only to the extent specifically designated by

> Declarant and only with respect to the particular rights and interests specifically designated.

CR 55.

Mr. Scofield developed two of Bandera's three phases. He divided Bandera Phases I and II into individual lots that the CCRs define as "Landholdings". He sold Landholdings to persons that the CCRs define as "Owners". The CCRs required these Landholding Owners pay "Assessments." Mr. Scofield, however, retained and owned Bandera Phase III. Since Phase III was not yet divided into Landholdings, Mr. Scofield was not an Owner and the CCRs did not obligate Mr. Scofield to pay Assessments. Noche Vista, at *3 and *8.

North Cascades National Bank ("NCNB") loaned Mr. Scofield money secured by Bandera Phase III. Id. at *1. The Association is unaware of any evidence in the record that NCNB also took a security interest in Mr. Scofield's developer rights. See CP 376-521 (Declaration of Jeff Davis of NCNB).

In May 2012, Mr. Scofield executed a deed in lieu of foreclosure transferring title in Bandera Phase III to NCNB in lieu of payment on his loan. Mr. Scofield's deed in lieu does not express Mr. Scofield's or NCNB's

intent that Mr. Scofield also transfer to NCNB developer rights to Bandera Phase III or to the rest of Bandera. Id. at *2.

In 2013, Noche Vista sought to acquire Bandera Phase III from NCNB. As a condition to its acquisition, Noche Vista required Mr. Scofield's 35 year period of developer control over Bandera, including Bandera Phase III, terminate. Id. at *1.

Mr. Scofield, the forming Bandera Homeowners Association, NCNB, and Noche Vista each participated in the creation of the CCRs' Seventh Amendment. The Seventh Amendment terminated Mr. Scofield's developer control over all of Bandera. It assigned management of Bandera to the Association. Id.

On April 12, 2013, Mr. Scofield recorded the Seventh Amendment. Id.

On April 15, 2013, Noche Vista closed on its purchase of Bandera Phase III, acquiring title from NCNB. Id. Noche Vista's title report disclosed the CCRs and the Seventh Amendment as encumbrances on Noche Vista's title. Id.

The Association formed on April 18, 2013. Id.

About three years later, Noche Vista sought to wriggle free (as the trial court put it) from the CCRs. Noche Vista first unsuccessfully requested its title company remove the CCRs as an encumbrance on Noche Vista's title report. After its title company refused, Noche Vista tried to convince the Association to remove Bandera's CCRs from Bandera Phase III. When this effort also failed, Noche Vista commenced this action to prevent the Association from enforcing the CCRs on Bandera Phase III. Id.

The trial court rejected Noche Vista's effort to wriggle free. It ruled the CCRs applied to Bandera Phase III, finding:

> [T]he essential issue presented … is whether the property described as tract 10 or phase III ("phase 3") is subject to the "Declaration of Covenants, Conditions, and Restrictions and Easements for Bandera at Bear Mountain Ranch" ("CCR's"). Despite plaintiff's best efforts to wriggle free of these legal restraints, the court answer the question yes … [Noche Vista's argument] misses the mark … [The Covenants] described the property encompassed by the CCRs, which included phase 3 … Paragraph 12.5, in turn, provides that any person who acquires any interest in any of the real property subject to the declaration agrees to the applicability and enforceability of the CCR's. See also paragraph 12.4.

CP 661-662.

On appeal, Division III likewise found Bandera's CCRs applied to Bandera Phase III, albeit for a different reason than the trial court. Noche

Vista, at *5. Adopting the Association's argument that the Seventh Amendment ended this litigation, the court ruled that the Seventh Amendment made the CCRs *fully* applicable to Bandera Phase III. It rejected Noche Vista's argument that for Bandera Phase III to be subject to Bandera's CCRs at all, Noche Vista's land must have been expressly annexed into Bandera. Id. at *8. Division III ruled that Bandera Phase III had always been a part of Bandera, but that the scope of the CCRs on Noche Vista's land was limited until Mr. Scofield's recording of the Seventh Amendment. With the Seventh Amendment, the Appeals Court ruled "Scofield merely exercised its authority under the Declaration to annex it [Bandera Phase III] by amendment." Id. at *7.

Noche Vista, joined by Amici, now seek this Court's review of Division III's decision. Each mistakenly argues that Division III erred when it applied well-established, long-standing Washington law to interpret the unique terms of the CCRs to Bandera Phase III, including ruling that Mr. Scofield's reserved developer rights in all of Bandera were personal and did not transfer to NCNB with Mr. Scofield's deed in lieu for Bandera Phase III.

D. ARGUMENT AGAINST REVIEW

1. Developer rights do not run with land

As the Court of Appeals correctly ruled, developer rights are divisible from title to real property. It found that the "[d]eveloper's rights are personal rights and do not run with the land". Id. at *7.

While the Court of Appeals cited foreign case law and the Restatement (Third) of Property: Servitudes to support its decision, its ruling is consistent with fundamental principles of real property law and existing Washington State law. Division III's opinion affirms that real property is made up of a bundle of rights, known as the bundle of sticks. Washington Real Property Desk Book, §107.1(3d ed.1996)(developer rights are part of bundle of sticks and severable from title). Eggleston v. Pierce Cty., 148 Wn.2d 760, 64 P.3d 618 (2003) (property consists of rights pertaining to a thing, not the thing itself), Kofmehl v. Steelman, 80 Wn. App. 279, 908 P.2d 391 (1996) (seller's interest in real estate contract is personal right), Manufactured Hous. Communities of Washington v. State, 142 Wn.2d 347, 13 P.3d 183 (2000), abrogated by Chong Yim v. City of Seattle, 194 Wn.2d 651, 451 P.3d 675 (2019) (right of first refusal is personal right and part of the bundle of sticks).

The following Washington law further supports the Court of Appeals' opinion that developer rights are personal, part of the bundle of sticks, and do not transfer with a deed in lieu. W. Main Assocs. v. City of Bellevue, 106 Wn.2d 47 (1986) ("[w]e have recognized that although less than a fee interest, development rights are beyond question a valuable right in property."), Burien Town Square Condo. Ass'n v. Burien Town Square Parcel 1, LLC, 3 Wn. App.2d 571, 416 P.3d 1286, review denied, 191 Wn.2d 1015 (2018) ("[t]he exercise of a development right does not include a transfer of those rights. Nor does the [Washington Condominium Act's] definition of development rights indicate that conveying property to a successor declarant results in the end of the period of declarant control … ").

As the above law shows, Division III's decision is consistent with the "bundle of sticks" of real property rights. Taking advantage of the ability to reserve the right to develop independent from title (through a covenant's encumbrance on title), reserved developer rights permit a developer (like Mr. Scofield) to both sell lots in a multi-phased subdivision and retain the ability to later use the lots (e.g. for roads, utilities, building

restrictions) for the benefit of the entire subdivision. Through this reservation, as an encumbrance on title, Washington law protects planned residential subdivisions from Noche Vista–style efforts to wriggle free. Washington law places "special emphasis on arriving at an interpretation [of covenants] that protects the homeowners' collective interests." Riss v. Angel, 131 Wn.2d 612, 934 P.2d 669 (1997).

Notably, Amici's argument for review is inconsistent from Noche Vista's conflicting position that Mr. Scofield, like other developers, wanted "maximum flexibility" for his future development plans. Noche Vista, at *7. Maximum flexibility required Mr. Scofield reserve developer rights for all of Bandera and to retain those rights until they expired or Mr. Scofield "specifically designated the rights" to a successor developer per the terms of the CCRs. This allowed Mr. Scofield the flexibility to jointly develop each phase of Bandera with his affiliated subdivision Bear Mountain Ranch.

While Amici cite no law to support their argument, Amici does reference, in error, the South Carolina Supreme Court opinion Peoples Fed. Sav. & Loan Ass'n of S.C. v. Resources Planning Corp., 358 S.C. 460, 596 S.E.2d 51 (2004). The South Carolina Supreme Court did not rule, as Amici

mistakenly claim, that developer rights run with the land. Instead, South Carolina law, like Division III in Noche Vista's case, affirmed that developer rights are personal and do not transfer with title, absent compelling circumstances. In Peoples Federal's case, the compelling circumstance was the developer and the homeowners association's conspiracy to impair the subject property's marketability to harm the bank, after the bank has acquired title in foreclosure. Peoples Fed., at 596, 61. South Carolina's exception to the established rule - that developer rights do not run with the land - is not applicable to Noche Vista. Here, there is no allegation of a civil conspiracy or need for an exceptional remedy.

2. Deeds in lieu do not automatically transfer developer rights

Amici incorrectly argue that reserved developer rights should automatically transfer with title. This position is inconsistent with the existing law cited above. It is also impractical.

As a personal right, a borrower must pledge its developer rights for its lender to acquire a security interest in those rights. See e.g. RCW 60.04.010 (encumbrances shall be by deed). This well-established law protects developers, lenders, and buyers. Developers and lenders are free (not forced) to determine if they desire developer rights to be part of a

loan's collateral package. If Amici's argument were adopted, developers would automatically pledge developer rights with title, even if the lender and the borrower did not intend. Developers, like Mr. Scofield, would lose the flexibility to develop multi-phase subdivisions, if they had to transfer one of those phases to their lender. Buyers would become subject to the lender's desires, even if the buyers owned land in another phase of the development.

The severability of developer rights from title also allows lenders the option to avoid the liability and obligations of acting as a successor developer, if the lender takes title to pledge real property in lieu if payment on the debt. For example, Amici's argument would impose on NCNB successor developer obligations over all of Bandera, despite NCNB holding title to only Bandera Phase III.

In sum, Amici argue to limit a developer's flexibility when creating a planned, multi-phase residential subdivision like Bandera or its adjacent and related Bear Mountain Ranch. If Amici's argument were adopted, all developer right in a multi-phased development would transfer to a lender, even if the lender acquired only one phase of the development. Using the

false fear of dead hand control, Amici fails to address why a lender should control an entire development, when it acquired only one phase of a multi-phase residential subdivision.

Lastly, in Noche Vista's case, the Association is unaware of any evidence that NCNB took a security interest in Mr. Scofield's developer rights or sought to ownership of those rights. The Association believes that the record shows no expression of Mr. Scofield's or NCNB's intent to pledge or transfer to NCNB Mr. Scofield's developer rights to all of Bandera. CP 376-521.

3. Washington's covenant interpretation law is unmistakable

As for Amici's annexation argument, Noche Vista was aware of the CCRs and Mr. Scofield's reserved developer rights. The CCRs appeared as an encumbrance on Noche Vista's title report. Noche Vista, at *1.

In addition to Noche Vista, others had acquired land in Bandera believing their "Landholdings" and Bandera Phase III were all subject to the CCRs that protected Bandera's common residential subdivision's plan. Id. at *8.

Recounting the above facts, Division III correctly applied this State's established law for covenant interpretation. Protecting the "Owners" of

"Landholdings" in Bandera from Noche Vista's on-going effort to wriggle free, the court cited Wilkinson v. Chiwawa Communities Ass'n, 180 Wn.2d 241, 327 P.3d 614 (2014) and other Washington case law to interpret the CCRs and the Seventh Amendment to Noche Vista's unique facts, holding that "the Declaration plainly authorized the annexation effectuated by the seventh amendment…" Noche Vista, at 8.

E. CONCLUSION

The Association respectfully submits that no Supreme Court review is necessary. Applying well-established law, Division III joined the trial court to correctly rule that the unique terms of the CCRs apply to Bandera Phase III.

RESPECTFULLY SUBMITTED this 11th day of February, 2021.

Respectfully submitted,

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DECLARATION OF SERVICE

On the 11th day of February, 2021, I electronically served a true and accurate copy of the ***Association's Response to Amici Memorandum*** in the Supreme Court of Washington State upon the following:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated February 11, 2021, at Wenatchee, Washington.

s/ Rayanne N. Grim
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