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COURT OF APPEALS
DIVISION TWO
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BY *[Signature]*

No. 41201-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

DALE E. and LETA L. ANDERSON; DALE E. ANDERSON and LETA
L. ANDERSON, TRUSTEES OF THE DALE E. ANDERSON AND
LETA L. ANDERSON FAMILY TRUST; AND RIVER PROPERTY
LLC,

Respondents,

v.

JAMES W. BROWN; ROBERTA D. DAVIS; KAE HOWARD;
TRUSTEE OF THE KAE HOWARD TRUST; MICHAEL J. and CRISTI
D. DEFREES, husband and wife; TUAN TRAN and KATHY HOANG,
husband and wife; VINCENT and SHELLY HUFFSTUTTER, husband
and wife; THOMAS J. and GLORIA S. KINGZETT, husband and wife;
LARRY R. and SUSAN I. MACKIN, husband and wife; TOD E.
MCCLASKEY, JR. and VERONICA A. MCCLASKEY, TRUSTEES OF
THE MCCLASKEY FAMILY TRUST—FUND A; CRAIG STEIN,
RICHARD AND CAROL TERRELL, husband and wife,

Appellants.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Plaintiffs/respondents improperly brought this declaratory judgment action to decide issues that are not yet ripe for determination and which will not provide a final and conclusive resolution to the issues presented. In addition, plaintiffs Anderson should not be allowed to seek judicial relief because they have failed to exhaust their administrative remedies. In particular, plaintiffs Anderson have a recently filed short plat application pending before the City of Vancouver, and the City authorities should be allowed to act upon that application without prejudgment by the courts. Accordingly, this Court should reverse the judgment and order entered by the trial court and remand the case with instructions that it be dismissed.

If the Court chooses to consider this case on the merits, it should conclude that plaintiffs Anderson must comply with the plat alteration statute before they can subdivide their lot. Alternatively, the Court should conclude that the covenants of Rivershore have been properly amended so as to prohibit any further subdivision of lots within Rivershore. Either conclusion should result in the reversal of the partial summary judgment entered below.

On plaintiffs' cross-appeal, the Court should decline to find that equitable estoppel applies to the facts of this case.

II. ARGUMENT

A. The Order Granting Partial Summary Judgment Should be Reversed Because This Action was Prematurely Brought by Plaintiffs.

1. The Trial Court's Judgment and Order Constitute an Advisory Opinion

At the time this lawsuit was filed, plaintiffs Anderson had abandoned their previously filed application to short plat lot 2. The application had not been acted upon, let alone denied. Despite that fact, plaintiffs filed a complaint for declaratory relief, asking the Court to determine that neither Rivershore's original covenants nor the recent amendment precluded plaintiffs from short platting their properties (CP 3-5).¹

While plaintiffs continue to assert that a justiciable controversy between the parties exists, thus making declaratory relief proper, they are not convincing in contending that the judgment below is something more than an advisory opinion. To constitute a justiciable controversy under the declaratory judgment act, the following elements must be established:

- (1) Parties must have existing and genuine rights or interests;
- (2) these rights or interests must be direct and substantial;
- (3) the determination will be a final judgment that extinguishes the dispute;
- (4) the proceeding must be genuinely adversarial in character.

¹ Only plaintiffs Anderson have any intention to short plat their lot. Neither plaintiff Trust nor plaintiff River Property LLC have plans to develop or divide their lots. Brief of Respondents, at p. 3.

Nelson v. Appleway Chevrolet, Inc., 160 Wn.2d 173, 186 (2007). If these elements are not met, “the court ‘steps into the prohibited area of advisory opinions.’” *Bloome v. Haverly*, 154 Wn. App. 129, 141 (2010), quoting *Branson v. Port of Seattle*, 152 Wn.2d 862, 877 (2004).

Plaintiffs cannot establish that the third element exists; namely, that a final judgment in this action will extinguish the dispute.

The trial court’s order (CP 264-268), by its terms, does not provide for a final resolution. Section A(2) of the Order states:

The original covenants...and the subdivision plat of Rivershore, do not address the further subdivision of any lot in Rivershore. The decisions of this court in this regard are not controlling on any determination that may be made on any particular short plat application that may be determined by the City of Vancouver.

Thus, whether a particular short plat application is prohibited by the original covenants or the Rivershore plat is left for future determination by the City of Vancouver. The Court’s ruling is in effect a non-ruling. The trial court implicitly recognized that plaintiffs Anderson were asking it to issue an advisory decision on a nonexistent hypothetical short plat application, and in effect the Court declined to do so. The Court’s error was to rule at all, where it should have instead dismissed plaintiffs’ lawsuit.

Plaintiffs try, but fail, to distinguish this case from *Bloome v. Haverly, supra*. There, the court similarly had no evidence of any actual construction plans for a building to be constructed. In finding that there was no justiciable controversy, the court held, at 154 Wn. App. at 146:

As there is no disputed building plan that a court can rule as being either in conformance with or in violation of the covenant, a judgment interpreting the scope of the covenant's restriction on development rights in the estate of the down hill parcel would constitute nothing more than an advisory opinion.

This case likewise presents a situation where there was no short plat application pending when the lawsuit was filed. There was nothing concrete for the trial court to rule on. In stating that any future application would simply have to be determined by the City of Vancouver, the court properly declined to rule hypothetically in a vacuum. To the extent the final order constitutes a ruling, it was merely advisory in nature.²

2. The Case Should Also be Dismissed due to Plaintiffs' Failure to Exhaust Their Administrative Remedies.

Plaintiffs Anderson had abandoned their application for short plat approval by the time this lawsuit was filed. They contend that they are not seeking a mandate requiring the City to approve any particular short plat

² Plaintiff River Property LLC ("River") repeatedly asserts that it sought a ruling as to the legality of its lot. No party has contended that River's lot is illegal. The City approved the creation of that lot, over objection, years ago. River's stated concerns are a non-issue, asserted only in a transparent attempt to create a justiciable controversy where one does not exist.

application. Brief of Respondents, at p. 4. What, then, is the point of this lawsuit?

In their opening brief, defendants explained the process that an applicant must follow in order to secure approval for a short plat or, if approval is denied, to obtain judicial review of that decision. Plaintiffs chose to circumvent that process, instead pursuing a hypothetical ruling as to the effect of the original and amended covenants. Not only was that course of action improper, plaintiffs Anderson in fact now have a short plat application pending before the City of Vancouver. If it was not previously clear that the plat approval process should be allowed to run its course, it is abundantly clear in the face of this post-order filing.

In their response, plaintiffs do not contest this proposition. Instead, they simply argue that the City is not equipped to address equitable concerns. Brief of Respondents, at p. 14-15. That may well be the case, but plaintiffs Anderson can certainly raise their equitable issues during the course of judicial review, once their pending short plat application has been denied.

Plaintiffs Anderson initially filed a short plat application and then abandoned it without pursuing their administrative remedies. After securing a court order that addressed a nonexistent application, they filed a new short plat application. This Court should reverse the trial court and direct

the dismissal of this lawsuit, allowing plaintiffs Anderson the opportunity to pursue their application and exhaust their administrative remedies.

B. The Plat and Original Covenants Prohibit the Short Platting of Lots Within Rivershore.

Should this Court not reverse the trial court for the above-stated reasons, it should find that the original plat and covenants of Rivershore preclude further short platting, or, at a minimum, should remand the case to allow discovery as to the intent of the original developers.

The stated purpose for plaintiffs' lawsuit was to obtain a ruling that Rivershore's original and amended covenants are ineffective to prohibit the short platting of lots within Rivershore. Defendants contended that the original covenants and the face of the plat do prohibit short platting, such that plaintiffs Anderson must comply with the plat alteration statute, RCW 58.17.215, in order to be able to subdivide lot 2. The trial court merely found that neither the original covenants nor the face of the plat address further subdivision of any lot in Rivershore (CP 267). In effect, the trial court determined that it could not rule in favor of plaintiffs or defendants on the issue that was central to plaintiffs' complaint.³

The parties agree that the interpretation of a restrictive covenant requires the determination of the declarant's intent. *See Hollis v. Garwall*,

³ This non-ruling crystallizes the conclusion that plaintiffs Anderson should be required to pursue their pending short plat application and to exhaust their administrative remedies.

Inc., 137 Wn.2d 683 (1999). Defendants contend that the clear intention of the declarant was to limit Rivershore to 13 single-family dwelling lots, with each lot holding a 1/13th interest in the adjoining tidelands. At a minimum, defendants contend that this matter should be remanded so that discovery can be conducted and evidence can be presented to the trial court regarding the intention of the developers of Rivershore. Plaintiffs seem to agree with this proposition, as they contend that the declarant's intent is not evident from the language of the original covenants or plat. Brief of Respondents, at 11. It must be recalled that this matter was decided on summary judgment, and that the trial court denied defendants' request for a continuance under CR 56(f), (CP 268). That request was based upon defendants' assertion that further discovery was necessary regarding the intent of the original developers of Rivershore (CP 205-207). The court abused its discretion in declining this request. *See, e.g., Coggle v. Snow*, 56 Wn. App. 499 (1990).

Defendants ask the Court to conclude that the proposed short plat by plaintiffs Anderson is contrary to the intention of the declarant, as set forth in the original covenants and on the face of the plat. If the Court is unable to reach this conclusion as a matter of law, defendants request that

this matter be remanded to the trial court so that further discovery may take place regarding the intention of the declarant.⁴

C. The 2008 Amendment to Rivershore's Covenants Should be Deemed Valid.

In their opening brief, defendants explained the reasoning behind their contention as to how the votes for the 2008 amendment to Rivershore's covenants should be calculated. Plaintiffs have objected that there is no argument or authority, citing *State v. Wood*, 89 Wn.2d 97 (1977). This is a very fact-specific situation, however, so it is hardly surprising that there is no legal authority for defendants' contention. On the other hand, there is in fact a fully developed argument set forth in defendants' opening brief. This case thus does not fall within the class of cases where there are "arguments not developed in the briefs." *See State v. Rice*, 159 Wn. App. 545, 570 (2011).

The crux of the issue is to determine which method of counting votes is consistent with the intent of Rivershore's developers. As explained in defendants' opening brief, the clear intention of the developers was for there to be only 13 votes within Rivershore. At the 80% threshold set forth in the covenants, a 10.4% affirmative vote is required to modify the covenants. As created, the covenants therefore

⁴ Plaintiffs argue that the trial court ruling can be affirmed on the alternative ground of estoppel. That contention will be addressed, *infra*, in the response to plaintiffs' cross-appeal.

required 11 Rivershore owners casting an affirmative vote to modify the covenants. With defendants' proposed solution, that each owner of the previously divided lot 13 receives a one-half vote, the intention of the original developers is honored. Counting the votes in that fashion leads to the conclusion that the 2008 amendment to the covenants was validly adopted.

Plaintiffs argue that allowing each owner of the divided lot to have a full vote, resulting in there being 14 votes instead of 13, is consistent with the intention of the developer. There is no evidence cited for that conclusion.

Defendants ask that the trial court's ruling be reversed, and that the 2008 amendment to the covenants be deemed valid. Alternatively, as set forth *supra*, the matter should be remanded to the trial court to allow additional discovery concerning the intent of the developer.

D. There is no Legal or Factual Basis to Conclude That Equitable Estoppel Applies to This Case, and Therefore Plaintiffs' First Cross-Assignment of Error is Without Merit.

Plaintiffs erroneously assert that defendants are estopped by acquiescence from asserting that there may be no further short platting of lots within Rivershore.⁵ The trial court properly concluded that, at a

⁵ Although plaintiffs particularly contend that defendant Brown is estopped from contesting their claims, even if they were correct the grounds for estoppel would not be applicable to the remaining defendants.

minimum, there were issues of fact precluding summary judgment on the issue of estoppel.

Equitable estoppel is not favored, and plaintiffs' evidence falls far short of establishing equitable estoppel as a matter of law. *See Teller v. APM Terminals Pacific, Ltd.*, 134 Wn. App. 696, 712 (2006):

Washington courts do not favor equitable estoppel, and a party asserting it must prove each of its elements by clear, cogent, and convincing evidence. The elements are: (1) an admission, statement, or act inconsistent with a claim afterward asserted; (2) an action by another in reasonable reliance on that act, statement, or admission; and (3) injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement, or admission.

Furthermore, whether equitable estoppel applies presents a question of fact unless there is only one reasonable inference that can be drawn from the evidence. *See, e.g., Shows v. Pemberton*, 73 Wn. App. 107, 111 (1994).

Equitable estoppel is even less likely to apply where the act complained of is one of silence or inaction, rather than an affirmative act. In *Federal Way Disposal Company v. City of Tacoma*, 11 Wn. App. 894 (1974), the court held that a city's failure to enforce a 1929 ordinance until 1967 did not operate as an estoppel because the city did not commit an affirmative act; it had merely failed to act at all.

Also, the court held that a party was not estopped from contesting the imposition of impact fees by virtue of the fact that he had failed to

object to such impact fees before a hearing examiner, since his “silence did not involve a representation of fact”, in *Nolte v. City of Olympia*, 96 Wn. App. 944, 955-56 (1999).

Plaintiffs’ argument is even weaker on the facts of this case. The evidence is that the defendants did object to the City when Mr. Brown sought to divide his lot several years ago (CP 21-27). After their objection was rejected by the City, they simply failed to pursue an appeal. Such conduct does not amount to an affirmative act or representation regarding the validity of the prior short plat, and it is certainly not inconsistent with the position defendants are taking in this case.

There is no evidence to support plaintiffs’ claim that defendants should be equitably estopped from contesting their claims, and the trial court ruled correctly in denying plaintiffs’ motion for summary judgment in that regard.

E. Plaintiffs’ Second Cross-Assignment of Error recognizes That the Trial Court Declined to Make a Final Ruling on Plaintiffs’ Claim for Declaratory Relief.

The trial court ruling under review expressly provided that the original covenants and plat of Rivershore do not address the further subdivision of any lot within Rivershore (CP 267). Accordingly, the court also ruled that it was up to the City of Vancouver to determine the validity of any particular short plat application in the future. *Id.* Although it is

difficult to determine the relief plaintiffs are seeking with their second cross-assignment of error, it appears that plaintiffs are reading the trial court's order as allowing the City to disregard the trial court's conclusion that the 2008 amendment to the covenants was not validly enacted.

Defendants suggest that this is a misreading of the court's order. Should this Court affirm the ruling that the 2008 amendment is invalid, defendants would not rely upon that amendment in connection with a particular short plat application.

By its terms, the court's ruling merely states its conclusion that the original plat and covenants do not address the further subdivision of any lot. Accordingly, the trial court made clear that it is up to the City to make an independent determination when presented with a short plat application as to whether, for example, the alteration statute must be followed because the proposed plat violates the original covenants or the original plat.

The nature of this cross-assignment of error highlights the impropriety of the trial court issuing a decision at all. Because there was no short plat application pending, the trial court's decision addresses only hypothetical situations. This provides additional support for defendants' request that the trial court be reversed on the grounds that it issued an advisory opinion or because plaintiffs failed to exhaust their administrative remedies.

F. The Trial Court Properly Ruled That Plaintiffs Were not Entitled to an Award of Attorney Fees.

Plaintiffs sought an award of reasonable attorney fees under section 19 of the original Rivershore covenants (CP 40):

Should any suit or action be instituted by any of said parties to enforce any of said reservations, conditions, agreements, covenants, and restrictions, or to restrain the violation of any thereof, after demand for compliance therewith or for the cessation of such violation, events, and whether such suit or action be entitled to recover from the defendants therein such sum as the court may adjudge reasonable attorney fees in such suit or action, in addition to statutory costs and disbursements.

The trial court properly ruled that plaintiffs' request for attorney fees did not fall within the terms of the contractual provision. An attorney fee award must be authorized by the terms of a contract. *See City of Sequim v. Malkasian*, 157 Wn.2d 251, 270-71 (2006), quoting *Bowles v. Department of Retirement Systems*, 121 Wn.2d 52, 70 (1993).

Plaintiffs' claims do not fall within the terms of this contract (the original covenants), and they do not meet any of the contractual conditions to a fee award. Plaintiffs did not ask the court to enforce any portion of the covenants. Plaintiffs did not seek to restrain the violation of any of the covenants. Plaintiffs did not demand compliance with the covenants prior to filing suit. By the clear terms of the covenants, this is not a situation where attorney fees are authorized by contract.

As the trial court properly found, even to the extent plaintiffs sought to invalidate the 2008 amendment to the covenants, the attempted amendment was not unreasonable, but rather was found to be invalidly enacted. Under those circumstances, an attorney fee award is not proper. *See Meresse v. Stelma*, 100 Wn. App. 857 (2000).

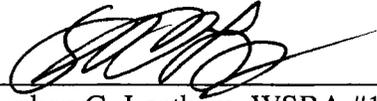
In contrast, upon reversal defendants are entitled to an award of reasonable attorney fees under the covenants as the prevailing parties. Their response to plaintiffs' complaint was to attempt to force plaintiffs to comply with the intent and terms of the covenants and original plat. Because RCW 4.84.330 renders the attorney fee provision bilateral, defendants are entitled to attorney fees in accordance with the terms of that provision. Defendants renew their request for an award of reasonable attorney fees as the prevailing party. *See* Brief of Appellants, at p. 24.

III. CONCLUSION

For the foregoing reasons, defendants request that the trial court's order and judgment be reversed, and that this matter be remanded to the trial court with directions that plaintiffs' lawsuit be dismissed. In the alternative, and at a minimum, defendants request that the order and judgment be reversed, and that this matter be remanded to the trial court for further discovery on the issue of the intent of the original developers of Rivershore.

RESPECTFULLY SUBMITTED this 31 day of March, 2011.

HEURLIN, POTTER, JAHN,
LEATHAM & HOLTMANN, P.S.

A handwritten signature in black ink, appearing to read 'SGL', written over a horizontal line.

Stephen G. Leatham, WSBA #15572
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CERTIFICATE OF SERVICE

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