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No. 41201-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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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.

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BRIEF OF APPELLANTS

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## I. INTRODUCTION

In 1989 an upscale platted subdivision was created on the Columbia River in Vancouver, Washington. The subdivision was known as Rivershore. It consisted of 13 lots and associated 1/13<sup>th</sup> interests in the tidelands that are part of Rivershore.

This action arose when plaintiffs Anderson sought to subdivide Lot 2, a parcel they own within Rivershore, into two building lots. When plaintiffs' neighbors objected to the proposed short plat of Lot 2, the office of the Vancouver City Attorney concluded that the short plat should be denied unless a plat alteration was filed. In the face of this recommendation, plaintiffs abandoned their short plat application and instead filed the instant lawsuit.

In their complaint plaintiffs sought a declaratory judgment that neither the original covenants and restrictions nor an amendment to them precluded plaintiffs from short-platting their property.

Following cross-motions for summary judgment and cross-motions for reconsideration, the Clark County Superior Court entered a judgment and order on August 20, 2010, concluding that the Court's April 8, 2010, order would serve as the final determination of the Court. In that order, the Court found:

1. The original covenants and subdivision plat do not address the further subdivision of any lot in Rivershore, and the decisions of the Court are not controlling on any future short plat application that may be filed; and

2. The amendment to the original covenants was invalid because 80 percent of the lot owners had not approved them.

## **II. ASSIGNMENTS OF ERROR**

A. THE TRIAL COURT ERRED IN PARTIALLY GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FOR DECLARATORY RELIEF.

1. DID THE COURT'S ORDER CONSTITUTE AN IMPROPER ADVISORY OPINION WHERE THERE IS NO PENDING SHORT PLAT APPLICATION?

2. DID THE COURT'S ORDER CONSTITUTE AN IMPROPER ADVISORY OPINION WHERE THERE WAS NO ACTUAL AND PENDING DISPUTE BETWEEN THE PARTIES THAT WAS CONCLUSIVELY DETERMINED BY THE COURT ORDER?

B. THE TRIAL COURT ERRED IN DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT IN WHICH THEY SOUGHT A DECLARATORY RULING THAT

PLAINTIFFS MAY NOT SEEK APPROVAL OF THEIR PROPOSED SHORT PLAT WITHOUT FIRST COMPLYING WITH RCW 58.17.215.

1. WAS PLAINTIFFS' PROPOSED SHORT PLAT INCONSISTENT WITH THE FACE OF THE ORIGINAL PLAT?

2. WAS PLAINTIFF'S PROPOSED SHORT PLAT INCONSISTENT WITH THE ORIGINAL RESTRICTIVE COVENANTS?

C. THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND CONCLUDING THAT THE 2008 AMENDMENT TO RIVERSHORE'S COVENANTS WAS INVALID.

1. SHOULD EACH OWNER OF THE TWO LOTS WITHIN SHORT-PLATTED LOT 13 EACH BE GIVEN A ONE-HALF VOTE IN DETERMINING WHETHER 80 PERCENT OF THE LOT OWNERS VOTED IN FAVOR OF THE AMENDMENT?

2. AT A MINIMUM, SHOULD THE PARTIAL SUMMARY JUDGMENT ORDER BE REVERSED SO THAT THE TRIAL COURT CAN CONSIDER EVIDENCE OF THE INTENTION OF THE ORIGINAL DEVELOPERS?

D. THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

1. DID PLAINTIFFS FAIL TO EXHAUST THEIR ADMINISTRATIVE REMEDIES?

2. DID PLAINTIFFS OTHERWISE FAIL TO COMPLY WITH THE REQUIREMENTS OF THE VANCOUVER MUNICIPAL CODE?

### III. STANDARD OF REVIEW

Review of a motion granting or denying summary judgment is “de novo.” *J.N. v. Bellingham School District No. 501*, 74 Wn. App. 49 (1994); *Schoneman v. Wilson*, 56 Wn. App. 776 (1990).

Plaintiffs bear the burden of establishing that there are no genuine issues of material fact. *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 502-503 (1992). Any doubt as to the existence of a genuine issue of material fact will be resolved against the movant and all inferences from the evidence must be construed in the light most favorable to the nonmoving party. *Magula v. Benton Franklin Title Company*, 131 Wn.2d 171 (1997). On their cross-motion, defendants bear the same burden.

### IV. STATEMENT OF THE CASE

The short plat which created Rivershore was created and approved in 1989 (CP 34). The plat contained 13 lots. Note 4 on the face of the plat provides that:

Tract "A" (the shoreline tract) to be owned and maintained by owners of record of lots 1-13; will be conveyed as an undivided 1/13 interest in, and to tract "A".

*Id.* In April 1989, the developer of Rivershore also created and recorded the original declaration of covenants and restrictions for Rivershore (CP 36-40). Section 1 of the declaration provides that no lot shall contain more than a single detached family dwelling (CP 36). Sections 15 and 16 address the Tract A tidelands, and provide that "the use and enjoyment of said parcel "A" be restricted to the owners of lots 1-13..." (CP 39). Section 15 mirrors note 4 from the face of the plat. *Id.*

The introduction to the covenants provides for the future modification of them (CP 36):

...if prior to such 30 year date, it appears to the advantage of this platted subdivision that these restrictions should be modified, then, and in that event, any modification desired may be made by affirmative vote of 80 percent of the then owners of lots within this subdivision and evidenced by a suitable instrument filed for public record...

In 2008, plaintiffs Anderson filed an application to short plat their Lot 2 in Rivershore into two lots, as a Tier One infill project. (CP 84-128).<sup>1</sup> The proposed plat contemplated dividing Lot 2, which already contained a single family home, into two separate lots, each containing a single family home (CP 86).

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<sup>1</sup> It is highly doubtful that estate properties fronting the Columbia River were intended to be the subject of "infill" projects.

On September 18, 2008, defendants submitted their objections to the proposed short plat (CP 32-44). Plaintiffs responded to this objection on September 25, 2008 (CP 129-130). Thereafter, plaintiffs took no further action with the City of Vancouver to move their short plat application forward (CP 133). Plaintiffs' short plat application was neither approved nor denied. *Id.* Instead of proceeding with their application, plaintiffs filed the instant lawsuit in March 2009 (CP 1-3).

In the meantime, the Vancouver City Attorney's office rendered an opinion concerning the objection to the short plat application (CP 45-49).

The City attorney concluded:

In summary, we believe the short plat should be denied and the applicant advised to submit a plat alteration application or a plat alteration with a separate short plat application. In order for the plat alteration to be approved, the applicant must obtain the agreement of all of the property owners providing that they agree to terminate or alter paragraphs 15 and 16 of the CC&R's to allow additional undivided ownership of Tract A.

(CP 45). The City Attorney also concluded that the proposed short plat was inconsistent with note number 4 on the face of the 1989 plat (CP 46-47). Finally, the City concluded that the proposed short plat was inconsistent with Rivershore's covenants (CP 47).

Although the City Attorney had suggested that plaintiffs proceed with a request for a plat alteration, plaintiffs did not seek a plat alteration,

appeal any decision regarding the original short plat filing, or take any further action regarding the short plat filing. (CP 133).

Several years earlier, in 2002, James Brown, who owned Lot 13 within Rivershore, sought to short plat Lot 13 (CP 13). A number of neighbors, including plaintiffs, objected to this proposal. *Id.* The City rejected the objection, however, and allowed Lot 13 to be subdivided (CP 27). Defendant Brown then sold Lot 2 of short platted Lot 13 to plaintiffs' company, River Property, LLC (CP 28-29). With this sale, the owners of Lots 1 and 2 of short platted Lot 13 each became owners of a 1/26 interest in the tidelands, as the original plat contemplated each owner within Rivershore having a 1/13 interest in those tidelands (CP 27; CP 36-40).

Despite this sale, defendants submit that there remain only 13 "lots" which may vote to modify the covenants. Twelve of those votes are Lots 1 through 12. The owners of Lots 1 and 2 of short platted Lot 13 should each be deemed to hold a one-half vote. This is consistent with the original plat's stated intention that there would be 13 undivided lot owners.

In September 2008, the owners of Rivershore voted to enact the first amendment to the declaration of covenants and restrictions for Rivershore (CP 51-64). This amendment added further clarity to the 1989 covenants, that the original 13 lots within Rivershore may not be further

subdivided or short platted (CP 52). The owners of Lots 1, 3, 5-12, and Lot 1 within short platted Lot 13 all approved the amendment to the covenants (CP 51-64). Only the plaintiffs and their LLC chose not to sign off on the modification.

If Mr. Brown is treated as having a one-half vote for his interest in what was previously Lot 13, then 10.5 of 13 votes were cast in favor of the amendment. That is 80.7% of the total available votes. Accordingly, more than the requisite 80% of the lot owners voted in March 2008 to approve the amendment to Rivershore's covenants.

On January 7, 2010, plaintiffs filed a motion for summary judgment (CP 74-75). Plaintiffs' principal contentions were that the amendment to the covenants was ineffective and that the original covenants did not preclude the proposed short plat (CP 65-74).

Defendants opposed plaintiffs' motion, contending that plaintiffs could not prevail in the absence of compliance with RCW 58.17.215, and cross-moved for the dismissal of the action because plaintiffs had not exhausted their administrative remedies (CP 76-83). (*See also* CP 137-142).

On April 8, 2010, the trial court entered an order granting in part plaintiffs' motion for summary judgment. (CP 264-268). In that order, the court concluded (CP 267):

1. That it had authority to make rulings under the declaratory judgment act, notwithstanding RCW Ch. 58.17;

2. The original covenants and the subdivision plat “do not address the further subdivision of any lot in Rivershore”, and the court’s rulings “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”;

3. The amendment to the covenants is invalid because an 80 percent vote was not achieved; and

4. Plaintiffs’ claims were not prohibited for failure to exhaust administrative remedies because they did not have a present application pending before the City of Vancouver.

Plaintiffs then filed a motion for clarification or reconsideration (CP 277-280). Defendants also filed a motion for reconsideration (CP 281-285).

In defendants’ motion for reconsideration, the defendants argued that the court’s order constituted an improper advisory opinion. *Id.*

On May 11, 2010, the court denied all parties’ motions for reconsideration (CP 300). This order was accompanied with a letter ruling, making clear that any application for further subdivision that may

be filed “must be dealt with administratively by the City of Vancouver.” (CP 298-299).

On July 27, 2010, the court issued its memorandum opinion, denying plaintiffs’ request for attorney fees (CP 311-313).

On August 20, 2010, the court entered its final judgment, adopting the April 8, 2010, order as the final determination of the court (CP 314-318). Defendants’ notice of appeal was then filed on September 14, 2010 (CP 319-331).

#### IV. LEGAL ARGUMENT

##### **A. The Trial Court Erred in Partially Granting Plaintiffs’ Motion for Summary Judgment for Declaratory Relief Because the Matter was not Ripe for Determination and the Court’s Order Therefore Constitutes an Improper Advisory Opinion.**

In August 2008, plaintiff Dale Anderson proposed to divide Lot 2 of Rivershore into a two-lot short plat, and a preapplication conference was scheduled for September 18, 2008 (CP 84-92). Defendants submitted objections to this proposal on September 18, 2008 (CP 32-44). Plaintiffs’ counsel responded to those objections on September 25, 2008 (CP 129-130). The Vancouver City Attorney’s office issued an opinion on December 5, 2008, concluding that the short plat should be denied unless plaintiffs submitted a plat alteration application or a plat alteration with a separate short plat application (CP 45-48).

Thereafter, plaintiffs took no action to pursue a short plat application or plat alteration (CP 133). There is no application pending before the City of Vancouver (CP 200). Indeed, the contemplated short plat remains nothing more than a possibility, and one which may or may not ever be pursued.

In their complaint, plaintiffs sought only a declaratory judgment “that neither the original Covenants nor the alleged “Amendment” preclude Plaintiffs from short-platting their properties.” (CP 3).<sup>2</sup> In the order of April 8, the Court found that the original covenants and the original subdivision plat do not address the further subdivision of any lot in Rivershore, and that the amendment to the original covenants is invalid (CP 264-268). The Court left it to the City of Vancouver to ultimately determine whether the original covenants or plat allow or prohibit any particular short plat application.

The Court’s final order does not address or resolve any ripe, pending, or actual dispute between the parties. In the absence of a pending short plat application, there was nothing for the Court to rule upon. Without an existing, justiciable controversy, the Court’s order constitutes a prohibited advisory opinion.

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<sup>2</sup> Plaintiffs’ complaint did not even ask the Court to address the original plat. Nor did their motion for summary judgment. Thus, the Court’s order goes beyond the relief requested in this case.

A party seeking declaratory relief must establish, as a threshold requirement, that a justiciable controversy exists between the parties. *Osborn v. Grant County*, 130 Wn.2d 615, 631 (1996). A “justiciable controversy” has been defined as:

(1)...an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.<sup>3</sup>

*To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411 (2001). Here, there is no present controversy that can be resolved by the declaratory judgment requested by plaintiffs. Accordingly, plaintiffs asked the trial court to issue an advisory opinion.

Instructive on this issue is the recent case of *Bloome v. Haverly*, 154 Wn. App. 129 (2010). There, the court reversed the trial court for issuing a prohibited advisory opinion where there was no mature dispute or justiciable controversy between the parties. Like this case, *Bloome* involved restrictive covenants, and whether the plaintiff could develop one of the parcels at issue. He filed a complaint for declaratory relief, seeking

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<sup>3</sup> Here, the trial court’s order does not direct the City how to rule on any particular application. Nor does it preclude the City from denying an application on any number of grounds. Thus, the order does not provide a “final and conclusive” ruling on the matter in issue.

a judgment that the restrictive covenant did not prohibit him from building a house on his parcel. The defendant sought a declaratory judgment that the covenant in fact did prohibit such development. Significantly, at the time the court entered its order, “nothing in the record indicate[d] that Bloome either planned or plans to construct a building on the downhill parcel.” *Bloome*, 154 Wn. App. at 137.

Because there were no specific plans before the court, Division I determined that a declaratory judgment was improper, stating, at 142:

In the absence of a dispute over whether actual building plans satisfy the covenant or of other evidence establishing a necessary minimum degree of interference with the view from the uphill property, a declaratory judgment as requested by either party would not conclusively settle the controversy between them.

In holding that declaratory relief was unavailable, the court concluded, at 146-47:

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 downhill parcel would constitute nothing more than an advisory opinion.

...further, the record does not establish the existence of an actual, mature dispute that could be conclusively resolved by the requested relief....Accordingly, neither party has established an entitlement to the declaratory relief he seeks.

The present case is to the same effect. There is no short plat application pending before the City of Vancouver. If and when one is filed, the parties can address that application at the administrative level, as is appropriate. Once the administrative process has been concluded and all parties have exhausted their administrative remedies, they can then proceed to court for a ruling that will resolve their controversy, should they so choose. Because there was no short plat application pending, however, the trial court ruled in a vacuum and issued a prohibited advisory opinion.

**B. The Trial Court Erred in Denying Defendants' Cross-Motion for Summary Judgment in Which They Sought a Declaratory Ruling that Plaintiffs may not Seek Approval of Their Proposed Short Plat Without First Complying with RCW 58.17.215, as a Subdivision Such as that Sought by Plaintiffs is Inconsistent with the Face of the Plat and with the Original Covenants.**

As correctly concluded by the Vancouver City Attorney's office, plaintiffs must comply with the provisions of RCW 58.17.215 in order to pursue approval of their proposed short plat. That "alteration" statute provides, in relevant part:

When any person is interested in the alteration of any subdivision or the altering of any portion thereof,...that person shall submit an application to request the alteration to the legislative authority of the city, town, or county where the subdivision is located. The application shall contain the signatures of the majority of those persons having an ownership interest of lots, tracts, parcels, sites, or divisions in the subject subdivision or portion to be altered.

If the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, and the application for alteration would result in the violation of a covenant, the application shall contain an agreement signed by all parties subject to the covenants providing that the parties agree to terminate or alter the relevant covenants to accomplish the purpose of the alteration of the subdivision or portion thereof.

The original subdivision was created with the clear intention to limit the subdivision to 13 single-family dwelling lots, with each of those lots holding a 1/13 interest in the adjoining tidelands. Note 4 on the face of the plat provides that:

Tract "A" (the shoreline tract) to be owned and maintained by owners of record of lots 1-13; will be conveyed as an undivided 1/13 interest in, and to tract "A".

(CP 34). Similarly, Rivershore was subject to restrictive covenants when it was created in 1989. Those covenants reflect the same intention. Section one of the covenants provides that no lot shall contain more than a single detached family dwelling (CP 36). Section 15 and 16 mirror note 4 from the face of the plat, and make clear that only the owners of lots 1 through 13 may own an undivided 1/13 interest in the tidelands, tract A (CP 36-40). The proposed short plat would violate those restrictions and the intention that Rivershore be limited to 13 single-family dwelling lots. As a result, plaintiffs are seeking an alteration of the Rivershore subdivision. Plaintiffs must therefore submit an application for alteration

that contains the signatures of all parties subject to the covenants. RCW 58.17.215. Plaintiffs have failed to do so, and are thus not entitled to proceed with their short plat application, let alone to have it approved, and the trial court should have so held.

Requiring plaintiffs to comply with the alteration statute is consistent with the rules applicable to disputes between lot owners in a subdivision. As held in *Fawn Lake Maintenance Commission v. Abers*, 149 Wn. App. 318, 324 (2009):

When a dispute arises between a landowner and the other owners in a subdivision, courts interpret covenants in a way that “place[s] ‘special emphasis on arriving at an interpretation that protects the homeowners’ collective interests.’”

In doing so, courts do not apply rules of strict construction, but rather look to the purposes sought to be accomplished by the covenant. *Id.*

Here, the purpose of the restrictions is clearly to maximize the future value of this riverfront property. Limiting development of Rivershore to 13 single-family dwelling lots maximizes the size of the lots and their resulting value. Limiting ownership of the tidelands to 13 lots similarly maximizes the value of those rights. Allowing “infill” projects such as the one proposed by plaintiffs is in no way in the Rivershore homeowners’ collective interests. As properly concluded by the City Attorney’s office, the proposed short plat would result in the violation of

the language and intent of these restrictions. Accordingly, the trial court erred in denying defendants' cross-motion for summary judgment, requiring plaintiffs to comply with RCW 58.17.215.

**C. The Trial Court Erred in Granting Plaintiffs' Motion for Partial Summary Judgment and Concluding that the 2008 Amendment to Rivershore's Covenants was Invalid.**

On October 15, 2008, the vast majority of the Rivershore homeowners caused to be recorded the first amendment to declaration of covenants and restrictions for Rivershore (CP 51-64). This amendment added the following language to section one of the original declaration, effective immediately:

Lots 1 through 13, consisting of the original 13 lots contained in Rivershore, shall not be further subdivided or short platted. (CP 52).

Every Rivershore owner except the plaintiffs voted in favor of and signed this amendment. These votes included the owners of lots 1, 3, 5-12, and lot 1 of short-platted lot 13. Only the owners of lots 2, 4, and lot 2 within short-platted lot 13 did not sign in favor of the modification. Each of these lots are owned by one or more of the plaintiffs.

The original covenants expressly allow for their modification if "80 percent of the then owners of lots within this subdivision" affirmatively vote in favor of a modification (CP 36). It is clear that 10 lot owners voted in favor of the modification. The dispositive question is

what to do with lot 13, given that it was subdivided in 2002 over the objection of Rivershore owners, into two smaller building lots (CP 27). Either each of the short-platted lot owners get a single vote (bringing the total available votes to 14), or each owner of lots 1 and 2 within short-platted lot 13 is given a one-half vote (keeping the total available votes at 13). Defendants submit that the appropriate, fair, and logical result is to grant a one-half vote to the owners of each of the smaller lots within short-platted lot 13. By doing so, the total votes available remain at 13.

This result is consistent with the original intention to restrict the ownership in Rivershore to 13 single-family dwelling lots. As created, the Rivershore covenants could be modified by an 80 percent vote. At 13 lot owners, 10.4 percent of the owners would have to vote affirmatively in order to pass a modification. If it were determined that 14 votes were available, it would require 11.2 votes to pass a modification. This is a significant difference, and would effectively give plaintiffs veto power over any possible modifications to the Rivershore covenants.

If each of the short-platted lot owners within lot 13 is afforded a one-half vote, the intention of the developers and the collective interests of the homeowners is honored. With the affirmative vote of lot 1 within short-platted lot 13, 80.76 of the lot owners voted in favor of the modification. Counting the votes in this fashion compels the conclusion

that the trial judge erred in finding that the 2008 amendment to the Rivershore covenants was legally ineffective.

At a minimum, the trial court's order should be reversed and this case should be remanded for a determination as to which vote-counting method comports with the intention of the original developers. Making this determination in connection with plaintiffs' motion for summary judgment was improper and is not supported by the record.

**D. The Trial Court Erred in Denying Defendants' Motion for Summary Judgment Where They Sought a Ruling that Plaintiffs had Failed to Exhaust Their Administrative Remedies or Otherwise Comply with the Requirements of the Vancouver Municipal Code.**

1. Plaintiffs Failed to Exhaust Their Administrative Remedies.

As set forth above, plaintiffs' proposed short plat was the subject of a pre-application conference on September 18, 2008. In December 2008, the City Attorney's office suggested that plaintiffs' application should be denied. Since the issuance of that opinion, however, the application has not been denied and plaintiffs have not submitted an application for an alteration. The application expired due to the passage of time.

Plaintiffs filed this lawsuit without exhausting their administrative remedies. They should have pursued the approval or denial of their application before seeking relief from the judicial system. If the

application was denied, plaintiffs could have appealed that decision under Vancouver Municipal Code 20.210.130. If that appeal were unsuccessful, plaintiffs could have then proceeded with an appeal to superior court. Plaintiffs took none of these steps, but rather interjected the judicial system into the application process. This failure to exhaust their remedies should result in the reversal of the order partially granting their motion for summary judgment and in the dismissal of their claims for relief.<sup>4</sup>

The doctrine of exhaustion of administrative remedies is well established in Washington, and is based “upon the belief that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional experience of judges.” *South Hollywood Hills Citizens Association v. King County*, 101 Wn.2d 68, 73 (1984). Where administrative remedies have not been exhausted, the courts will not intervene. *Id.* Here, plaintiffs did not pursue their application to conclusion, let alone through the appeals available to them. As a result, the underlying order should be reversed and plaintiffs’ claims should be dismissed because plaintiffs have not exhausted their administrative remedies.

An applicant who desires to develop land in the City of Vancouver must first request a pre-application conference. Two of the purposes of the

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<sup>4</sup> Indeed, plaintiffs did file a second short plat application with the City as this appeal was pending.

pre-application conference are to (1) “acquaint the applicant with the applicable requirements of the Vancouver Municipal Code and other laws to identify issues and concerns in advance of a formal application to save the applicant time and expense through the process,” and (2) “inform applicable...neighborhood associations of potential development activity within their neighborhoods.” VMC §20.210.080(A)(2) and (3).

Type II development applications, like the one at issue in this case, involve the following steps:

- a. Pre-application conference.
- b. Formal application including payment of required fees.
- c. City determines at filing whether the application is “counter-complete.”
- d. Within 28 days after receiving a “counter-complete” application, the planning official notifies the applicant of that fact.
- e. Within 14 days after determination of completeness, the planning official distributes a detailed Notice of Application.
- f. A 14-day comment period follows publication and mailing of the Notice of Application.
- g. Final Decision is made on the application within 120 calendar days (or 90 days for short subdivisions) after determination of completeness.

h. Notice of Decision is issued.

VMC §20.210.050; VMC §20.210.020B(2).

The applicant may appeal the Notice of Decision within 14 days after the Notice of Decision is mailed, and that appeal will be heard by a Hearings Examiner. VMC §20.210.020(2) and VMC §20.210.130. The decision of the Hearings Examiner may be appealed to Superior Court within 21 days from such decision. *Id.* The Notice of Decision becomes final on the day after the appeal period expires, VMC §20.210.130(M), after which time the applicant may submit a final plat application under VMC §20.320.050.

2. Plaintiffs Have Failed to Follow the Required Procedures Under the Vancouver Municipal Code and State Statutes.

In September 2008, plaintiffs submitted to the City of Vancouver certain documents in connection with a request for the pre-application conference required by VMC §20.210.050(A) (CP 143-152). Based on that request, the City scheduled a pre-application conference per VMC §20.210.080(G), and issued a Pre-Application Conference summary per VMC §20.210.080(H) (hereafter, “Summary”) (CP 153-187). The Summary indicates (CP 155) that plaintiffs’ proposal is governed by the Type II decision-making process. Plaintiffs were therefore required to

submit a formal “counter complete” application within one year from the pre-application conference. VMC §20.210.080(J).

There is no evidence that plaintiffs submitted a formal preliminary plat application for short platting Lot 2 within the Rivershore subdivision, as required by VMC §20.320.030. Indeed, plaintiffs have not taken any required administrative action beyond attending the pre-application conference. After the City attorney’s office issued its legal opinion, plaintiffs effectively abandoned their efforts to submit to the City the required documentation concerning their proposed development of Lot 2.

The City’s legal opinion (CP 45-49) notes that the plaintiffs’ application to short plat Lot 2 would be denied because VMC §20.320.040(E) “requires compliance with all of the terms and conditions of the existing subdivision as approval criteria for a short plat,” and their proposal is inconsistent with Note 4 of the 1989 subdivision plat. The City’s legal opinion also notes that a plat-alteration application (under RCW 58.17.215) would be inconsistent with the 1989 CC&R’s, and would therefore require an agreement by all owners within the subdivision to terminate or alter the covenants that prohibit the division of Lot 2 into separate parcels.

Recognizing that the City had interpreted the VMC to prohibit a short-plat application (because of Note #4 of the original plat), and that

they would not be able to obtain the unanimous consent of their neighbors in order to comply with the plat-alteration requirements of RCW 58.17.215, plaintiffs filed the instant lawsuit in March 2009. They did so without even filing their short-plat application and obtaining a Notice of Decision from the City. If they had filed their short-plat application with the City and received a Notice of Decision denying same, plaintiffs could then appeal that decision to the Hearings Examiner, and if still unsatisfied with the result, could file an appeal with the superior court. Plaintiffs have not come close to exhausting their administrative remedies. The judgment below should be reversed for that reason and plaintiffs' claims should be dismissed, requiring plaintiffs to proceed through the administrative channels before seeking relief from the courts.

**E. Defendants Should be Awarded Attorney Fees.**

Pursuant to RAP 18.1 and section 19 of the original covenants and restrictions (CP 36-40), defendants should be awarded reasonable attorney fees as the prevailing party on appeal.

**VI. CONCLUSION**

For the foregoing reasons, the order partially granting plaintiffs' motion for summary judgment and denying defendants' cross-motion for summary judgment should be reversed, and this matter should be remanded to the trial court for the dismissal of plaintiffs' claims for relief.

DATED this 13 day of December, 2010.

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  
Of Attorneys for Appellants

COURT OF APPEALS  
10/27/10 5:10:10  
STATE OF OREGON  
BY \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I certify that I caused the foregoing BRIEF OF APPELLANTS to  
be served on the following:

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