

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY ~~STEPHEN G. LEATHAM~~  
DUPLICATE

No. 42925-0-II  
Cons. into **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/Cross-Appellants,

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/Cross-Respondents.

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BRIEF OF APPELLANTS/CROSS-RESPONDENTS

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## I. INTRODUCTION

Appellants<sup>1</sup> submit their opening brief in support of their appeal under RCW Ch. 36.70C, the Land Use Petition Act. Appellants ask this Court to reverse the Clark County Hearing Examiner's denial of appellants' appeal of the City of Vancouver's April 6, 2011 approval of respondent Dale Anderson's short plat application.

This action arises from that application, in which Anderson sought to divide his residential lot, which fronts the Columbia River, into two lots. The lots are contained within a Clark County short plat development known as Rivershore, created and approved in 1989 for 13 lots.<sup>2</sup>

Appellants contend that respondent's short plat application constitutes a plat alteration under RCW 58.17.215-220. Because the Hearing Examiner disagreed with this contention, appellants filed the instant appeal.<sup>3</sup>

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<sup>1</sup> Mike and Cristi DeFrees, Rick and Carol Terrell, Craig Stein, Kae Howard Trust, Tuan Tran and Kathy Hoang, the McClaskey Family Trust-Fund A, Larry and Susan Mackin, Vincent and Shelley Huffstutter, Roberta Davis, and James Brown.

<sup>2</sup> Respondent's previous short plat application concerning this same lot was litigated in Clark County Superior Court. The trial court's ruling in connection with that application is the subject of the appeal into which this appeal was consolidated.

<sup>3</sup> Appellants will not address the decision of the Clark County Superior Court regarding appellants' land use petition, as this Court reviews the actions of the City "on the administrative record, without reference to the Superior Court decision." *Rosema v. City of Seattle*, 166 Wn. App. 293, 297 (2012). See also *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 468 (2003).

## **II. ASSIGNMENTS OF ERROR**

A. THE HEARING EXAMINER ERRED IN UPHOLDING THE CITY'S PROCESSING RESPONDENT'S APPLICATION AS A SHORT PLAT APPLICATION, RATHER THAN AS A PLAT ALTERATION UNDER RCW 58.17.215-220 AND UNDER VMC 20.320.080(D).

1. The Plat Alteration Statutes and Related Municipal Code Provision Require the Application to be Processed As a Plat Alteration Request.
2. Whether Respondent Was Required to Submit a Plat Alteration Application was not Decided in the Prior Litigation.

## **III. STANDARD OF REVIEW**

This Court's review of the factual issues and the conclusions drawn from them is to be confined to the record before the Hearing Examiner. RCW 36.70C.120(1). The Court may then grant appellants relief if they establish either one of the following standards:

1. The land use decision was an erroneous interpretation of the law [RCW 36.70C.130(1)(b)]; or
2. The land use decision was a clearly erroneous application of the law to the facts [RCW 36.70C.130(1)(d)].

Significantly, this Court need not find that the Hearing Examiner's decision was arbitrary and capricious in order to grant relief to petitioners. RCW 36.70C.130(2).

For claimed errors of law such as this, this Court conducts de novo review. *See Deer Creek Developers, LLC v. Spokane County*, 157 Wn. App. 1, 9, *rev. den.*, 170 Wn.2d 1021 (2010).

For claims that there was a clearly erroneous application of the law to the facts, the Court may grant relief "when it is left with the definite and firm conviction that the hearing examiner made a mistake." *Id.*

Appellants contend that they are entitled to relief under either or both of the standards set forth above: error of law or erroneous application of the law to the facts.

#### **IV. STATEMENT OF THE CASE**

The short plat which created Rivershore was approved in 1989. Administrative Record ("AR"), Sec. 6, Rec. 34. CP 1288. The plat contained 13 riverfront lots, as well as a shoreline tract. Note 4 on the face of the plat limited ownership of the shoreline tract to the 13 owners of lots 1-13:

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. AR, Sec 2, Rec. 9, at Exh. 19. CP 561-565. Section 1 of the Declaration provides that no lot shall contain more than a single detached family dwelling. *Id.* 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...” *Id.* Section 15 mirrors note 4 from the face of the plat. *Id.*

In 2008, respondent Anderson filed his first application to short plat his Lot 2 in Rivershore into two lots, as a Tier I infill project. AR Sec. 8, Rec. 69. CP 1548-1563.<sup>4</sup> The proposed short plat contemplated dividing Lot 2, which already contained a single family home, into two separate lots, each containing a single family home. *Id.*

On September 18, 2008, appellants submitted their objections to the proposed short plat. AR Sec. 8, Rec. 64. CP 1512-1524. Anderson responded to this objection on September 25, 2008. AR Sec. 8, Rec. 63. CP 1509-1510. Thereafter, respondent took no further action with the City of Vancouver to move his short plat application forward. The short plat application was neither approved nor denied. Instead of proceeding with the application, respondent filed a lawsuit in March 2009. This case

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<sup>4</sup> It is highly doubtful that estate properties fronting the Columbia River were ever intended to be the subject of “infill” projects.

was filed in Clark County Superior Court, Cause No. 09-2-01661-9. After the trial court made final rulings (AR Sec. 6, Rec. 32; CP 1243-1247), the decision was appealed to Division Two.<sup>5</sup>

In the meantime, the Vancouver City Attorney's office had rendered an opinion concerning appellants' objection to the short plat application. AR Sec. 8, Rec. 59. CP 1492-1495. 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.

The City Attorney also concluded that the proposed short plat was inconsistent with note number 4 on the face of the 1989 plat. *Id.* Finally, the City Attorney concluded that the proposed short plat was inconsistent with Rivershore's covenants. *Id.*

In 2010, respondent submitted a new short plat application for Lot 2. AR Sec. 7, Rec. 54. CP 1395-1446. This application again sought to divide respondent's lot into two lots. On April 6, 2011, City of

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<sup>5</sup> That appeal remains pending, and the instant appeal was consolidated with it.

Vancouver staff issued its report and decision, granting preliminary plat approval with conditions. AR Sec. 4, Rec. 11. CP 768-944.

Appellants appealed the staff report and decision on April 19, 2011. AR Sec. 3, Rec. 10. CP 701-764. City staff issued its report and recommendation to the Hearing Examiner on May 27, 2011. AR Sec. 2, Rec. 9. CP 445-697. Despite the previous opinion letter from the City Attorney's office, and despite the grant of preliminary plat approval, City staff took a "rare neutral position" in connection with the appeal. CP 447.

After a hearing on June 8, 2011, Hearing Examiner Sharon A. Rice issued a decision denying appellants' appeal on June 16, 2011. AR Sec. 1, Rec. 1. CP 395-408. It is this decision that is under review before this Court.

## **V. LEGAL ARGUMENT**

### **A. The Hearing Examiner Erred in Upholding the City's Processing Respondent's Application as a Short Plat Application, Rather Than as a Plat Alteration Under RCW 58.17.215-220 and Under VMC 20.320.080(D).**

#### **1. The Plat Alteration Statutes and Related Municipal Code Provision Require the Application to be Processed as a Plat Alteration Request.**

Appellants contend that the City Attorney office's December 5, 2008 letter and initial opinion is a correct interpretation of the law;

namely, that RCW 58.17.215 and VMC 20.320.080(D) require respondent to file a plat alteration application.

RCW 58.17.215 provides, in relevant part:

When any person is interested in the alteration of any subdivision or the altering of any portion thereof, except as provided in RCW 58.17.040(6), 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.

VMC 20.320.080(D) provides:

D. Revisions of recorded plats. The subdivider shall file the final short plat or plat and attached documents for record with the Clark County Auditor. Any alteration or modification of a short subdivision or subdivision plat shall be undertaken pursuant to all applicable development standards including regulations established in 58.17.215-220 RCW by a Type II or Type III process, respectively. (Emphasis added.)<sup>6</sup>

RCW 58.17.215 applies by its terms whenever a subdivision, or any part of it, is to be altered. The Vancouver Municipal Code has no

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<sup>6</sup> A copy of this Code provision is attached as Appendix A.

ordinance addressing plat alterations other than VMC 20.320.080(D). That section mandates that any alteration or modification of a subdivision shall be processed under RCW 58.17.215. The further division of any lot in a subdivision is a fundamental alteration or modification of that subdivision. It adds additional lots to the subdivision and additional impacts on the roads, improvements, and common areas (here, critically, including the shoreline tract) of the subdivision. If the City intended that a short plat could serve to re-divide a platted subdivision lot without a plat alteration application, it could have specifically so provided by ordinance. It has not done so.

This is a case of first impression. No published opinion from a Washington appellate court discusses exactly what constitutes an “alteration” so as to trigger the application of RCW 58.17.215. Assuming that the Legislature therefore intended its words to carry dictionary meaning, it is enlightening to note that Webster’s Third New International Dictionary defines “alter” as follows: “To cause to become different in some particular characteristic.” It cannot seriously be contended that creating two lots out of one does not cause that lot to become different. The language of the statute and the language of the Vancouver Municipal Code is broad and encompassing. As a matter of interpretation, this Court should conclude that respondent’s request to divide his lot into two

building lots is an alteration, requiring compliance with the provisions of RCW 58.17.215.

Respondent will presumably contend, as he did before the Hearing Examiner, that the further division of a platted lot is not a plat alteration, relying upon Attorney General Opinion 12 (March 14, 1980). AR, Sec. 1, Rec. 4, at Ex. A thereto. CP 424-428. AGO 12, however, interpreted a predecessor statute to RCW 58.17.215 (RCW 58.12.020). That statute was drafted with permissive language, however, and was only one of several approaches available at the time to effect an alteration. The language of RCW 58.17.215, in contrast, is mandatory, not permissive.<sup>7</sup> AGO 12 does not address RCW 58.17.215 and sheds no light on the application of that statute to these facts.

In determining whether the statute applies to respondent's attempt to short plat his lot, this Court's primary objective should be to ascertain and give effect to the intent of the Legislature. *See, e.g., In Re Detention of A.S.*, 138 Wn.2d 898, 911 (1999). Here, the Legislature utilized the term "shall," as did the drafters of the Vancouver Municipal Code, thereby creating an imperative obligation to comply with the statutory provisions. *See, e.g., State v. Martin*, 137 Wn.2d 149, 154-55 (1999). If the proposed division of the lot is an "alteration," it is therefore imperative that

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<sup>7</sup> RCW 58.17.215 did not come into effect until 1987, seven years after AGO 12 was issued.

respondent comply with the mandatory terms of the statute. Because the Legislature did not define “alteration,” and because no reported case has interpreted the word’s meaning in the alteration statute, it is appropriate for this Court to utilize the dictionary meaning of the term. *See, e.g., Bowie v. Washington Dept. of Revenue*, 171 Wn.2d 1, 11 (2011):

In *HomeStreet* [166 Wn.2d 444 (2009)], we affirmed that we first look to a statute’s plain language when interpreting its meaning. If the plain language is subject to only one interpretation, our inquiry ends because plain language does not require construction. Absent ambiguity, the interpretation of a statute’s plain language is guided by the common and ordinary meaning of its words.

We may look to the dictionary to determine the plain meaning of an undefined statutory term... (Citations omitted.)

As discussed above, the dictionary provides that an alteration occurs when something is made to become different. That definition reflects the “plain meaning” of the word. Here, respondent seeks to turn one residential lot into two residential lots. In so doing, he will certainly be making the existing lot different. Accordingly, he is seeking to alter his lot, triggering the requirement to comply with RCW 58.17.215.

Despite the mandatory language of the statute, the Hearing Examiner looked to other considerations in determining that respondent was not required to comply with the plat alteration procedure.

The Hearing Examiner’s conclusion 1 states:

The Appellants argue that VMC 20.320.080(D) requires that any short plat, including the instant short plat, to undergo plat alteration procedures in addition to short plat procedures. The logical conclusion of the Appellants' argument is that no short plat could be approved without a plat alteration – creating a mandatory dual process.

AR, Sec. 1, Rec. 1, at p. 11. CP 405. This conclusion is misguided and erroneous. It overlooks the fact that there are likely hundreds of acres of land in this City, and thousands in this State, that have never been the subject of a short plat or subdivision application. For those properties, a short plat application alone would be sufficient to create a subdivision. However, where property has been previously subdivided and a new alteration is desired (including a further division), the plat alteration code and statute apply. It is only through the plat alteration process that other owners of lots in the subdivision have any material say in whether the alteration to their subdivision is allowed. It is not the creation of a short plat that requires an alteration; it is the further short plat of an existing subdivision that creates the alteration.

Once it is determined that a subdivision or “any portion” of it is being altered or modified, RCW 58.17.215 requires two standards to be met. First, a majority of the lot owners in the subdivision must sign the application. If the applicant cannot get a majority of the lot owners to sign

the application, he has not met the requirement of RCW 58.17.215 and his application must be denied.

Second, even if the applicant can obtain a majority of the lot owners to sign the application, if the subdivision is subject to restrictive covenants which were filed at the time of original approval and the proposed alteration would violate those covenants, all of the parties affected by the covenants must sign an agreement confirming that the affected portion of the covenants is terminated or modified by the alteration.

Here, respondent has not even attempted to comply with either of the requirements of RCW 58.17.215. He has not sought the signatures of any other lot owners in Rivershore. And he has taken no steps to address the fact that a further subdivision of Lot 2 would be contrary to the plat's and declaration's limitation of the ownership of tract "A" to be owned by the 13 Rivershore lot owners with 1/13<sup>th</sup> undivided interests per each lot.

This Court should conclude that the Hearing Examiner erred in not finding that respondent's further division of his lot in this subdivision requires that a plat alteration application to be submitted. Such a ruling is compelled by the language of the plat alteration statute and the terms of the Vancouver Municipal Code, and is not inconsistent with any prior decision by the trial court that is at issue in the companion appeal. Upon

such a ruling, respondent will need to file the plat alteration application and obtain the approval of a majority of the lot owners in the subdivision. If he fails to do so, his application will be denied without ever reaching the question of whether the original covenants or the amendment would be violated by the plat alteration.

**2. Whether Respondent Was Required to Submit a Plat Alteration Application was not Decided in the Prior Litigation.**

The Hearing Examiner erred in upholding the processing of the application as a short plat application and not as a plat alteration under VMC 20.320.080(D) and RCW 58.17.215-220. The first proposed short plat of the Anderson parcel was the subject of litigation in Clark County Superior Court, but the alteration issue was not reached in that case. Respondent brought a declaratory judgment action against appellants to obtain a ruling that the Rivershore Declaration did not prevent a further short plat of the Anderson lot. The trial court entered an Order on April 8, 2010, specifically finding in paragraph A 2 that the original covenants neither allow nor preclude the further subdivision of any lot in Rivershore:

The original covenants, recorded under Clark County Auditor's Number 8905300158, which covenants are attached hereto as Exhibit A, and the subdivision plat of Rivershore, do not address 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.

The trial court's decision has been appealed to this Court and was consolidated with this appeal for a hearing and decision.

It is important to recognize what the trial court's Order did and did not do. The trial court did not rule that RCW 58.17.215 did not apply to the issue of whether the Rivershore subdivision plat was being altered by a further short plat of a lot. The Court simply found that the original covenants and plat did not address, one way or the other, any further subdivision of any lot in Rivershore. With the present appeal, appellants assert that RCW 58.17.215 and VMC 20.320.080(D) indeed require that a plat alteration application be submitted, and that issue was never ruled upon by the trial court.

Prior to the trial court's order, the Vancouver City Attorney's office issued an opinion dated December 5, 2008, concluding that a short plat of a lot in Rivershore would require the applicant to file an application for a plat alteration under VMC 20.320.080(D) and RCW 58.17.215 *et. seq.* AR Sec. 8, Rec. 59. CP 1492-1495.

Subsequent to the trial court's order, the City Attorney's office changed its position and issued another letter, indicating in light of the trial court's ruling that "...the subdivision plat of Rivershore does not

address the further subdivision of any lot in Rivershore....,” the City would accept a short plat application and process it without the requirement of a plat alteration. AR Sec. 7, Rec. 47-48. CP 1367-1372.

Respondent then filed the second short plat application and obtained preliminary approval from the City. Before the Hearing Examiner, City Staff changed course again and took a neutral position on respondent’s short plat application. Appellants suggest that the City Attorney’s initial opinion correctly concluded that respondent may only proceed by complying with the statutory plat alteration process, and ask this Court to rule in accordance with that opinion.

**VI. CONCLUSION**

For the foregoing reasons, the decision of the Hearing Examiner should be reversed. This matter should be remanded, with respondent being directed to comply with the plat alteration statutes and city code provisions if he wishes to proceed with the proposed division of his lot.

DATED this 7 day of May, 2012.

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



Stephen G. Leatham, WSBA #15572  
Of Attorneys for Appellants/Cross-  
Respondents

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**CERTIFICATE OF SERVICE**

I certify that I caused the foregoing BRIEF OF APPELLANTS/CROSS-RESPONDENTS to be served on the following

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# APPENDIX A



City of  
**VANCOUVER**  
Washington, USA



Pride, Progress, and Possibilities

City of Vancouver ▶ City Government ▶ Municipal Code ▶ Title 20 ▶ Chapter 320 ▶ **Section 080**

### **Vancouver Municipal Code**

↳ [Return to Chapter 20.320 SUBDIVISIONS](#)

#### **Section 20.320.080 Other Provisions.**

A. Variances. One or more variances may be requested relating to any of the design or development standards contained within Section 20.320.070 VMC except those for which variances are expressly prohibited, as listed in Chapter 20.290.010 VMC. These shall be requested concurrently subject to the procedural requirements and approval criteria contained in Chapter 20.290.040 VMC. No variances to procedural regulations are permitted.

B. Proximity to agricultural and mineral activities

1. All plats or development approvals under this Title issued for residential development activities within 1/4 mile of lands zoned agricultural or from existing agricultural or mineral resource operations shall be accompanied by a notice provided by the Planning Official. Said notice shall include the following disclosure:

a. The subject property is within 1/4 mile of designated agricultural land or mineral resource land as applicable, on which a variety of commercial activities may occur that are not compatible with residential development for certain periods of limited duration. Potential discomforts or inconveniences may include, but are not limited to: noise, odors, fumes, dust, smoke, insects, operation of machinery, including aircraft, during any hour period, storage and disposal of manure, and the application by spraying or otherwise of chemical fertilizers, soil amendments, herbicides and pesticides.

b. In the case of subdivision plats, short subdivision plats or recorded binding site plans, such notice shall also be recorded separately with the Clark County Auditor.

2. All plats or development approvals under this Title issued for residential development activities shall provide a barrier such as fencing or vegetation between the immediately-adjacent residential lots and agricultural and mineral resource activities. A natural buffer, such as a wetland, swale or berm, may substitute for the barrier upon approval of the Planning Official. Lots with street frontage are not required to provide a barrier between residential uses and an adjacent agricultural or mineral resource activity across the street.

C. Subdivisions of commercially and industrially zoned properties

1. Preliminary plats for commercial and industrial properties shall comply with all of the requirements of Section 20.320.030 VMC and 20.320.040 VMC.

2. Final plats for commercial and industrial properties shall comply with all of the requirements of Section 20.320.060 VMC except that the final plat shall be in substantial compliance with the preliminary plat if lot sizes are within the range of lots sizes proposed for the preliminary plat, if lot sizes were shown on the preliminary plat.

D. Revisions of recorded plats. The subdivider shall file the final short plat or plat and attached documents for record with the Clark County Auditor. Any alteration or modification of a short subdivision or subdivision plat shall be undertaken pursuant to all applicable development standards including regulations established in 58.17.215-220 RCW by a Type II or Type III process, respectively.

(M-3701, Amended, 05/02/2005, Sec 12, Prior Text; M-3643, Added, 01/26/2004)