

No. 48653-9

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

CORY JESPERSEN and MELISSA JESPERSEN,

Appellants,

v.

CLARK COUNTY, a political subdivision of the State of Washington, and DOUGLAS
LASHER, Clark County Treasurer,

Respondents.

RESPONDENTS' BRIEF

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I. TABLE OF CONTENTS

| | |
|---|----|
| I. INTRODUCTION..... | 1 |
| II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR | 3 |
| III. RESPONDENT’S STATEMENT OF THE CASE..... | 4 |
| A. RELEVANT HISTORY OF SUBJECT TAX PARCEL | 4 |
| B. PLAINTIFFS’ EXPRESS AGREEMENT TO “AS IS / WHERE IS” TERMS FOR FEBRUARY 4-5, 2014 TAX FORECLOSURE AUCTION | 7 |
| C. PLAINTIFFS’ ACQUIRE LOT 27 AT TAX FORECLOSURE AUCTION | 8 |
| D. PLAINTIFFS RESEARCH THE LEGAL STATUS OF LOT 27 AFTER ACQUIRING IT AT THE SUBJECT PROPERTY IN THE TAX FORECLOSURE AUCTION..... | 9 |
| IV. PROCEDURAL POSTURE OF CASE | 10 |
| V. ARGUMENT..... | 11 |
| A. PLAINTIFFS’ RESCISSION CLAIMS ARE BARRED BY THE DOCTRINE OF <i>CAVEAT EMPTOR</i> AND THEIR ACCEPTANCE OF THE “AS IS / WHERE IS” TERMS OF THE TAX FORECLOSURE AUCTION..... | 11 |
| B. THE SUBDIVISION ACT CANNOT BE REASONABLY INTERPRETED TO PENALIZE AND REMEDY THAT WHICH THE FORECLOSURE ACT EXPRESSLY REQUIRES..... | 16 |
| 1. The legislature did not intend the Subdivision Act to penalize and remedy mandatory functions of local government required by the Foreclosure Act. | 18 |
| 2. The plain language of RCW 58.17.210 demonstrates that it is not applicable because “rescission” is not a remedy that is possible in the foreclosure context. | 22 |
| 3. Washington’s canons of statutory construction give preference to the specific and mandatory terms of RCW 84.64, which does not provide for rescission or refund, over the more general terms of RCW 58.17. | 25 |
| C. PLAINTIFFS’ COMMON LAW RESCISSION CLAIMS ALSO FAIL BECAUSE RESCISSION IS IMPOSSIBLE IN THE FORECLOSURE CONTEXT AND BECAUSE THERE WAS NO FAILURE OF CONSIDERATION IN THIS CASE..... | 28 |

| | | |
|-----|---|----|
| D. | PLAINTIFFS’ SUBSTANTIVE DUE PROCESS CLAIMS FAIL BECAUSE THEY HAVE NOT BEEN REGULATED BY CLARK COUNTY OR RCW 84.64 AND BECAUSE THEIR PARTICIPATION IN THE TAX FORECLOSURE AUCTION WAS NOT “UNDULY OPPRESSIVE.” | 31 |
| E. | PLAINTIFFS HAVE NOT BEEN DEPRIVED OF ANY RIGHT OR INTEREST GIVING RISE TO A VIOLATION OR CLAIM UNDER THE CIVIL RIGHTS ACT. | 41 |
| F. | PLAINTIFFS’ <i>FACIAL</i> PROCEDURAL DUE PROCESS CHALLENGES TO RCW 84.64 CANNOT OVERCOME THE PRESUMPTION OF CONSTITUTIONALITY. | 43 |
| G. | PLAINTIFFS <i>AS APPLIED</i> PROCEDURAL DUE PROCESS CLAIMS ARE NOT RIPE AND NONETHELESS AMOUNT TO A FACIAL CHALLENGE OF RCW 84.64. | 46 |
| VI. | CONCLUSION | 48 |

Cases

| | |
|--|-------------------|
| <i>Alliance One Receivables Management, Inc. v. Lewis</i> , 180 Wn.2d 389, 395, 325 P.3d 904 (2014)..... | 22 |
| <i>American Continental Ins. Co. v. Steen</i> , 151 Wn.2d 512, 519, 91 P.3d 864 (2004)..... | 22 |
| <i>Anderson v. King County</i> , 200 Wash. 354, 93 P.2d 284 (1939)..... | 2, 12, 34, 39, 44 |
| <i>Barber v. Rochester</i> , 52 Wn.2d 691, 328 P.2d 711 (1958)..... | 28 |
| <i>Bartz v. Department of Corrections</i> , 173 Wn. App. 522, 538, 297 P.3d 737 (2013)..... | 17, 20 |
| <i>Bateson v. Geisse</i> , 857 F.2d 1300, 1303 (9th Cir.1988) | 42 |
| <i>Belenski v. Jefferson County</i> , WA. Sup. Ct. Slip Opinion, 92161-0, pp. 8-10 (2016)..... | 17, 20 |
| <i>Cannon v. Dep't of Licensing</i> , 147 Wash.2d 41, 57, 50 P.3d 627 (2002)..... | 17, 20 |
| <i>Capital Savings & Loan Ass'n v. Convey</i> , 175 Wn. 224, 27 P.2d 136 (1947)..... | 28 |
| <i>City of Federal Way v. Koenig</i> , 167 Wash.2d 341, 347, 217 P.3d 1172 (2009)..... | 15 |
| <i>City of Redmond v. Moore</i> , 151 Wn.2d 664, 668, 91 P.3d 875 (2004) | 43 |
| <i>Dep't of Ecology v. Campbell & Gwinn, LLC</i> , 146 Wn.2d 1, 9, 43 P.3d 4 (2002)..... | 22 |
| <i>Didlake v. Washington State</i> , 186 Wn.App 417, 423, 345 P.3d 43 (2015)..... | 43, 44, 47 |

| | |
|---|-------------------|
| <i>Guimont v. Clarke</i> , 121 Wash.2d 586, 854 P.2d 1 (1993)..... | 35 |
| <i>Heavens v. King County</i> , 66 Wash.2d 558, 404 P.2d 453 (1965)..... | 35 |
| <i>Hilton v. DeLong</i> , 188 Wash. 162, 61 P.2d 1290 (1936)..... | 2, 12, 34, 39, 44 |
| <i>In re Brazier Forest Products, Inc.</i> , 106 Wn.2d 588, 594-95, 724 P.2d 970 (1986)..... | 23 |
| <i>In re Estate of Kerr</i> , 134 Wn.2d 328, 343, 949 P.2d 810 (1998)..... | 25 |
| <i>Knatvold v. Rydman</i> , 28 Wn.2d 178, 182 P.2d 9 (1947)..... | 28 |
| <i>Mathews v. Eldridge</i> , 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)..... | 44 |
| <i>Morrison v. Dept of Labor Indust.</i> , 168 Wn.App 269,272, 277 P.3d 675 (2012)..... | 43, 44, 46 |
| <i>Orion v. State</i> , 109 Wn.2d 621, 648-49, 747 P.2d 1062 (1987)..... | 35 |
| <i>Pierce County v. Desart</i> , 9 Wn.App 760, 762, 515 P.2d 500, 552 (1973)..... | 45 |
| <i>Pierce County v. Newbegin</i> , 27 Wash.2d 451, 178 P.2d 742 (1947)..... | 2, 11, 34, 44 |
| <i>Presbytery of Seattle v. King County</i> , 114 Wash 2d 320, 330, 707 P.2d 907,913 (1990)..... | passim |
| <i>R/L Associates Inc. v. City of Seattle</i> , 113 Wn.2d 402,412, 780 P.2d 838 (1989)..... | 42 |

| | |
|---|---------------|
| <i>Ravenscroft v. Wash. Water Power Co.</i> , 136 Wn.2d 911, 920–21, 969 P.2d 75 (1998)..... | 22 |
| <i>Rivett v. Tacoma</i> , 123 Wash.2d 573, 870 P.2d 299 (1994)..... | 35 |
| <i>Robinson v. City of Seattle</i> , 119 Wn.2d 34, 56, 830 P.2d 318 (1992)..... | 41, 42 |
| <i>Schultz v. Kolb</i> , 189 Wash. 187, 192, 64 P.2d 79 (1937)..... | 36 |
| <i>Shelton v. Kickitat County</i> , 152 Wash. 193, 277 P.839 (1929)..... | 2, 34, 39, 44 |
| <i>Shook v. Scott</i> , 56 Wn.2d 351, 367, 353 P.2d 431 (1960)..... | 28 |
| <i>Sinatra v. Seattle</i> , 119 Wash.2d 1, 829 P.2d 765 (1992)..... | 35 |
| <i>State v. Contreras</i> , 124 Wn.2d 741, 747, 880 P.2d 1000 (1994)..... | 17, 20 |
| <i>State v. Ervin</i> , 169 Wn.2d 815, 820, 239 P.3d 354 (2010)..... | 22 |
| <i>State v. McDonald</i> , 183 Wn. App. 272, 333 P.3d 451 (2014)..... | 17, 20 |
| <i>State v. Stoddard</i> , 192 Wash.App. 222, 226, 366 P.3d 474 (2016)..... | 47 |
| <i>Upjohn v. Russell</i> , 33 Wn. App. 777, 780, 658 P.2d 27 (1983)..... | 17, 20 |
| <i>Weden v. San Juan County</i> , 135 Wn.2d 678, 706, 958 P.2d 273 (1998)..... | 34 |

Statutes

RCW 58.17 10, 15, 17, 20

RCW 58.17.20 23

RCW 58.17.210 13, 14, 18, 20, 21, 22, 23, 24, 26, 27

RCW 58.17.300 17, 19, 20

RCW 84.64.....6, 7, 8, 15, 20, 25, 27, 29, 31, 32, 35, 36,
38, 42, 43, 44, 45, 46, 47

RCW 84.64.050 6, 20, 25, 44

RCW 84.64.050 - .080 21

RCW 84.64.050(1)..... 26

RCW 84.64.050-.080 21, 25, 27

RCW 84.64.080 9, 14, 20, 23, 24, 26, 29

Other Authorities

§1983..... 41, 42

CCC 40.210.020..... 4

CCC 40.210.020(A)..... 29

CCC 40.520.020(c)..... 30, 31

I. INTRODUCTION

This action arises from Plaintiffs' failure to perform any due diligence prior to speculatively purchasing real property [Lot 27] in an "As Is / Where Is" tax foreclosure auction administered by the Clark County Treasurer. Prior to participating in this auction, Plaintiffs expressly agreed to *caveat emptor* auction terms, which provided in relevant part that:

"The County does not guarantee that all properties are buildable lots. All properties are offered for sale on a "where is" and "as is" basis without any representation or warranty, express or implied. It is the responsibility of the purchaser to do their own research as to the use of the properties for their intended purpose and to inspect the property personally to determine if it will be suitable for the purpose for which it is purchased."

(CP 146)

After acquiring Lot 27 at auction, Plaintiffs researched the legal status of property by requesting publically available records from Clark County. Upon receiving these records, Plaintiffs discovered that Lot 27 was not a legally subdivided lot and determined that they did not want the property after all. This lawsuit represents Plaintiffs' misguided attempt to shift responsibility for the outcome of their real estate speculation and failure of due diligence to Clark County and its taxpayers. Specifically, Plaintiffs seek rescission of the tax foreclosure auction under Washington's

Subdivision Act and alternatively, seek damages for alleged violations of their constitutional rights. These theories are un-supported by the law and the facts of this case.

In advancing these legal theories, Plaintiffs are really seeking to avoid their express agreement to “As Is / Where Is” auction terms and the application of the doctrine of *caveat emptor*, which Washington courts have applied to inherently speculative tax foreclosure auctions for more than eighty years. *Pierce County v. Newbegin*, 27 Wn.2d 451, 178 P.2d 742 (1947); *Shelton v. Kickitat County*, 152 Wn.2d 193, 277 P.839 (1929); *Anderson v. King County*, 200 Wn.2d 354, 93 P.2d 284 (1939); *Hilton v. DeLong*, 188 Wn.2d 162, 61 P.2d 1290 (1936).

The trial court correctly dismissed Plaintiffs’ rescission claims and gave effect to the doctrine of *caveat emptor* because tax foreclosure auctions are not subject to, or capable of, rescission under the Subdivision Act or common law. The trial court also properly dismissed Plaintiffs’ constitutional claims because Plaintiffs’ acquisition of Lot 27 in a voluntarily “As Is / Where Is” tax foreclosure auction was neither unduly oppressive nor a deprivation of any private interest.

This Court should reject Plaintiffs’ misguided attempt to shift responsibility for their own failure of due diligence and affirm the trial court’s orders granting summary judgment to Clark County.

II. ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR

Respondent rejects Petitioners' issues pertaining to assignment of error and submits the following:

Issue 1: Whether the doctrine of *caveat emptor* applies to tax foreclosure auctions when Washington appellate courts have repeatedly so-held; and where it is undisputed that the prevailing auction bidder expressly agrees to “As Is / Where Is” terms of sale and then fails to perform any pre-auction due diligence and/or research of publically available records that would reveal the legal status of the property they acquire. (Assignment of Error 1)

Issue 2: Whether the *Subdivision Act* penalties and rescission remedy apply to tax foreclosure auctions when county treasurers are compelled by the *Foreclosure Act* to foreclose upon and auction any property where taxes are three years delinquent, regardless of its legal status, and then immediately disburse the proceeds of that sale to taxing jurisdictions and the prior owner of the property. (Assignment of Error 1)

Issue 3: Whether a bidder at a tax foreclosure auction is “unduly oppressed” in deprivation of his constitutional rights when he voluntarily agrees to “As-Is / Where-Is” terms of a tax foreclosure auction and then proceeds to acquire property of his choosing for a price of his choosing without performing any pre-auction due diligence. (Assignment of Error 2)

Issue 4: Whether a voluntary bidder at a tax foreclosure auction is deprived of his constitutional right to procedural due process when he expressly agrees to “As Is / Where Is” terms of a tax foreclosure auction and then proceeds to acquire property of his choosing for the price of his choosing without performing any pre-auction due diligence. (Assignment of Error 2)

III. RESPONDENTS STATEMENT OF THE CASE

A. Relevant History of Subject Tax Parcel

Tax Parcel 273503000 (hereinafter “Lot 26”) and 273504000 (hereinafter “Lot 27”) are adjacent properties in rural Clark County. (CP 23, 117-119). Lot 26 is a 6.8 acre parcel with an existing home on the property, while Lot 27 is a 2.89 acre hillside vacant lot on a creek. (CP 14-15, 341). Each of these properties are located in an R-10 zone, where residential uses are generally permitted on lots that are 10 acres or larger. *See* CCC 40.210.020 (CP 269-278, 341). Property zoned R-10 may also be used for farming, forestry, recreational and conservation activities. *Id.*

On November 28, 1995, the owner of Lot 26 and Lot 27, deeded both lots to Michael W. Anderson and Mickey L. Anderson. (CP 116-19). In 1998, the Andersons requested a legal lot determination from Clark County regarding whether Lot 26 and Lot 27 were *together* a legal lot of

record. In response to this request, Clark County published Development Review Decision – Lot 98-033, which concluded that “Tax Lots 26 and 27 are ONE LEGAL LOT.” (CP 43-46). Subsequently, the Andersons requested another legal lot determination, seeking recognition of Lot 27 as a legal lot (for purposes of building a residence) even though it had been created in violation of platting laws applicable at the time it was created. After conducting a review, Clark County *conditionally* approved Lot 27 as a legal lot of record. (CP 47-52). This determination set forth a number of conditions, including the following:

1. Have a wetland delineation performed for tax Lot 27, which clearly shows the area for a home site. This delineation must be reviewed and approved by Clark County prior to the issuance of any development permits on tax Lot 27.
2. Should a suitable home site not be found on tax Lot 27 a boundary line adjustment may be performed to move tax Lot 27 outside of the wetlands area. If an adjustment is needed a separate application for a Boundary Line Adjustment, with appropriate fee, will be required.

[...]

Id.

The Andersons elected not to satisfy the conditions for Lot 27 and sold the larger 6.8 acre lot (Lot 26) on August 6, 1999. (CP 53-54). Because the

first Development Review Decision (#98-033) had recognized Lot 26 and Lot 27 as one legal lot *together*, the sale of Lot 26 without having met the conditions of the second Development Review Decision (#98-030) rendered Lot 27 an illegally subdivided lot. (CP 43-52)

All Development Review Decisions are publically available documents that are maintained by the Clark County Department of Community Development. (CP 381-382). These documents are made available to any member of the public that requests them. (CP 381-382). This has been the case since at least 2007 and at all material times in this case, including the days, weeks and months leading up to the subject tax foreclosure auction on February 4-5, 2014 (CP 381-382).

In 2006, Andersons stopped paying real property taxes on Lot 27 and after three years of delinquency Clark County initiated foreclosure proceedings in 2009 pursuant to RCW 84.64.050 and obtained a judgment of foreclosure for Lot 27. (CP 157). In of February 2010, pursuant to the judgment of foreclosure, the Clark County Treasurer conducted a tax foreclosure auction and conveyed a Treasurer's Deed for Lot 27 to the highest bidder, Christian Amae. (CP 157). Following this auction, Mr. Amae never paid any real property taxes on Lot 27 and, after three years of delinquency, Clark County again initiated mandatory foreclosure proceedings pursuant to RCW 84.64. (CP 157). On January 17, 2013,

Clark County obtained a judgment of foreclosure for Lot 27 and, on February 4-5, 2014, proceeded to conduct the tax foreclosure auction that is the subject of this lawsuit pursuant to RCW 84.64. (CP 157).

B. Plaintiffs' Express Agreement to "As Is / Where Is" Terms for February 4-5, 2014 Tax Foreclosure Auction

Prior to participating in the February 4-5, 2014 online tax foreclosure auction, all auction participants (including Plaintiffs) expressly agreed to detailed and unambiguous auction terms of auction. (CP 143-148). These agreed upon terms provided in relevant part:

"Bidders are required to conduct any research of due diligence they wish to conduct prior to bid submittal. A bid is an irrevocable offer to purchase property and once made is a binding contract.

[...]

"The County does not guarantee that all properties are buildable lots. All properties are offered for sale on a "where is" and "as is" basis without any representation or warranty, express or implied. It is the responsibility of the purchaser to do their own research as to the use of the properties for their intended purpose and to inspect the property personally to determine if it will be suitable for the purpose for which it is purchased.

[...]

Research and Inspect Thoroughly Before You Bid

Prospective purchasers are urged to examine the title, location and desirability of the properties available to their own satisfaction **prior** to the sale. The County Treasurer

makes no warranty, either express or implied, relative to the usability, location, property lines or topography.”

(CP 143-44, 143-48) (emphasis in original).

It is undisputed that the Plaintiffs in this case agreed to these terms prior to participating in the subject tax foreclosure auction. (CP 144-148). It is further undisputed that Plaintiffs did not research the legal lot status of Lot 27 until after the tax foreclosure auction. (CP 328-329,331). The following is an exchange between the trial court and Plaintiffs’ counsel addressing this point:

THE COURT: So your position is that your client did adequate investigation on his own to determine?”

MR. ERIKSON: I acknowledge that that inquiry and response occurred after February 6, when the treasurer signed – signed the deed [...].

(Verbatim Rep. of Proceedings 5/1/15, p. 38:15-20).

C. Plaintiffs’ Acquire Lot 27 at Tax Foreclosure Auction

On February 4, 2014, pursuant to RCW 84.64, the Clark County Treasurer established the minimum bid for Lot 27 at \$8,842, which consisted of the taxes, interest and penalties then owing on the property at the time of the auction. (CP 151) During the course of the two day tax foreclosure auction, Plaintiffs bid on Lot 27 twenty-six separate times to bring the final auction price up to \$28,600. (CP 144, 150-51).

Following the foreclosure auction of Lot 27, the Clark County Treasurer distributed the taxes for Lot 27 to various taxing authorities and disbursed ALL of the surplus auction proceeds to the prior owner of the property (Mr. Amae) as required by to RCW 84.64.080. (CP 310). Clark County did not retain any of the surplus proceeds from the tax foreclosure auction of Lot 27. (CP 310).

D. Plaintiffs Research the Legal Status of Lot 27 After Acquiring it at the Subject Property in the Tax Foreclosure Auction.

After acquiring Lot 27 at auction, Plaintiffs began researching the legal status of the property to determine whether it was possible to build a single-family home on the property. (CP 121,331) (Verbatim Rep. of Proceedings 5/1/15, p. 38:15-20). During this post-auction research, Plaintiffs requested a copy of the 1999 Development Review Decision for Lot 27 from Clark County (PDR #98-030). (CP 121, 223). On February 13, 2014, in response to this post-auction request, Clark County provided Plaintiffs with a copy of the 1999 Development Review Decision (PDR #98-030). (CP 223) Upon receipt of this publically available document, Plaintiffs promptly realized that Lot 27 was currently an “illegal lot,” meaning that it was not suitable for construction of a single family home. (CP 121, 223).

On February 19, 2014, Plaintiff Cory Jespersen summarized his post-auction research and due diligence efforts in a detailed email to Clark County Councilor David Madore. (CP 121). In this e-mail, Mr. Jespersen confirmed that he did not begin researching the status and development potential of Lot 27 or conferring until after the foreclosure auction. (CP 121).

IV. PROCEDURAL POSTURE OF CASE

On June 9, 2015, the trial court *denied* Plaintiffs' motion for partial summary judgment and *granted* Defendant Clark County and Douglas Lasher's cross-motion for partial summary judgment and dismissed the following claims: (1) Plaintiffs' claims for statutory rescission pursuant to RCW 58.17; (2) Plaintiffs' claims for common law rescission; (3) Any and all claims against Clark County Treasurer Douglas Lasher pursuant to qualified immunity.¹

On June 17, 2015, Plaintiffs filed a motion for reconsideration to clarify that only the constitutional claims against Clark County Treasurer Douglas Lasher had been dismissed pursuant to qualified immunity and that constitutional claims against Clark County were preserved for further

¹ During the May 1, 2015 partial summary judgment hearing, Plaintiffs' counsel stipulated on the record to the dismissal of all claims against Clark County Treasurer Douglas Lasher. ("We stipulate to dismissal of Defendant Lasher"). (Verbatim Rep. of Proceedings 5/1/15, p. 54 ll. 12-13).

proceedings. (CP 246-48). This motion was unopposed and was granted by the trial court. (CP 255).

On February 11, 2016, the trial court *denied* Plaintiffs' motion for summary judgment on their remaining state and federal due process claims and *granted* Clark County's cross-motion for summary judgment on these same remaining claims.²

On February 23, 2016, the trial court entered a General Judgment of Dismissal & Money Judgment for Statutory Attorney Fees in favor of Clark County. (CP 403-405).

V. ARGUMENT

A. Plaintiffs' rescission claims are barred by the doctrine of *caveat emptor* and their acceptance of the "As Is / Where Is" terms of the tax foreclosure auction.

Washington appellate courts have repeatedly held that the doctrine of *caveat emptor* applies to tax foreclosure auctions and that such "buyer beware" auctions do not give rise to a claim for rescission and/or refund. *See Shelton v. Kickitat County*, 152 Wn. 193, 277 P.839 (1929); *See also Pierce County v. Newbegin*, 27 Wn.2d 451, 178 P.2d 742 (1947); *See also*

² During the December 18, 2015 summary judgment hearing, Plaintiffs' counsel formally abandoned their takings claims on the record. ("For the record, we have abandoned takings claims.") Verbatim Rep. of Proceedings 12/18/15, p. 12 ll. 2-3).

Anderson v. King County, 200 Wn. 354, 93 P.2d 284 (1939); *See also Hilton v. DeLong*, 188 Wn. 162, 61 P.2d 1290 (1936).

The Washington Supreme Court's holding in *Shelton* is particularly instructive and controlling because, like the present case, it involves a refund claim arising from a tax foreclosure sale where the terms of sale expressly disclaimed any warranty. *Shelton* at 197. In *Shelton* the plaintiff purchased a piece of property at foreclosure that he later learned was located within a drainage improvement district and subject to a large lien of assessment that had not yet become due. *Id.* at 194-195. In *Shelton*, neither the notice of sale nor the deed executed following the sale gave notice of this lien. *Id.* However, the *Shelton* Court held that such tax sales are without warranty and that the buyer bears the risk in a tax sale unless there is a statute that requires a warranty or otherwise provides for repayment due to a defect in the foreclosure proceeding or a failure of title passing to the grantee by the deed. *Id.* at 197.

“If this sale and conveyance by the county to Shelton was in legal effect a tax sale, then it seems clear that the rule of *caveat emptor* stands insurmountably in the way of Shelton’s recovery from the county the purchase price, there being in this state no statute requiring any warranty in the deed of conveyance, or providing for repayment of the purchase price because of any defect in the proceeding leading up to the sale, or failure of title passing to the grantee by the deed.”

Id. (emphasis added).

There is no Washington authority that supports Plaintiffs' claim that the doctrine of *caveat emptor* in the foreclosure context is somehow abrogated by, or in any way connected to, the remedies available under the Subdivision Act. Plaintiffs appear to argue that the Subdivision Act meets the hypothetical statutory exception to the doctrine of *caveat emptor* envisioned by the *Shelton* Court. (Brief of Appellants, pp. 13-14). However, this argument is misplaced because a plain reading of the portion of the Subdivision Act relied upon by Plaintiffs (RCW 58.17.210) reveals that it is not the hypothetical foreclosure refund statute envisioned by the *Shelton*. Specifically, RCW 58.17.210 is not a "statute requiring any warranty in the deed of conveyance, or providing for repayment of the purchase price because of any defect in the [foreclosure] proceeding leading up to the sale." *Id.* Moreover, the Subdivision Act does not require warranties and does not provide a remedy that is triggered by any "defect in the proceeding leading up to the sale." *Id.* Rather, as discussed in greater detail below, this statute governs traditional real estate transactions where there is a willing seller and willing buyer and provides a remedy of rescission for "violations" of the Subdivision Act, a remedy that is impossible in a tax foreclosure context.³ *Infra* at 21-22, 28.

³ The remedy of "rescission" requires that all parties to a transaction be put back into the position that they were in prior to a sale. *See* Black's Law Dictionary (10th ed. 2014). Footnotes continued on the next page.

Even if it were assumed for the sake of argument that RCW 58.17.210 were the type of hypothetical foreclosure “refund” statute envisioned by the *Shelton* Court,⁴ Plaintiffs have not alleged any *defect* in the foreclosure proceedings that would trigger a refund. (CP 1-11) Rather, Plaintiffs have conceded that Clark County was statutorily required to foreclose upon Lot 27 and have not claimed that Clark County failed to comply with any statutory or common law foreclosure requirement. (CP 1-11)

Shelton and its progeny have been the black letter law in the State of Washington for more than eighty years because tax foreclosure auctions are necessary to collect delinquent taxes and because local government is not in a position to be a guarantor that auctioned property is free of encumbrance and/or fit for any particular purpose. The legislature has

This is not possible in the tax foreclosure context, where counties never own the property being auctioned and do not retain any of the surplus proceeds of the sale. In the present case, Clark County cannot be put back into the position it was in prior to the sale through “rescission” because it never owned Lot 27 in the first place. Additionally, rescission is not possible in the present case because the surplus auction proceeds were distributed to the prior owner pursuant to RCW 84.64.080, meaning that any refund would require the expenditure of new taxpayer funds. These factors would put Clark County, and its taxpayers, in a different and *worse* position than it was prior to the mandatory tax foreclosure auction.

⁴ Unlike our case, “rescission” was at least theoretically possible in *Shelton* because the *Klikitat County* owned the subject property prior to the tax sale and presumably had the right to retain the auction proceeds following the sale. Under these circumstances, and provided that there was some statutory authority, the sale could theoretically be rescinded because it was possible to put the county and the plaintiff back in the positions they were in before the sale.

been presumptively aware of this application of the doctrine of *caveat emptor* to such auctions since *Shelton* was decided in 1937 and has not amended RCW 84.64 to require any guaranties, warranties, or refunds to tax-foreclosure auction participants. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 347, 217 P.3d 1172 (2009).⁵ Unless and until the legislature requires counties to issue guarantees and refunds in the foreclosure context, the doctrine of *caveat emptor* should continue to apply.

Plaintiffs seek to overrule this well-established common law doctrine and require all Washington counties to effectively guarantee that tax foreclosure properties, which are owned and controlled by third parties (delinquent taxpayers), have been properly subdivided pursuant to RCW 58.17. (Brief of Appellants, pp. 14-15). The theory advanced by Plaintiff would require counties to foreclose upon and auction illegally subdivided lots pursuant to RCW 84.64 and then, at any time following the auction, rescind those sales at the option of the foreclosure auction buyer, even if the proceeds of the sale had already been distributed. This is a patently un-tenable outcome. Like the trial court, this Court should decline Plaintiffs' invitation to replace the well-established doctrine of *caveat*

⁵ *City of Federal Way* at 347, "This court presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision."

emptor with an unworkable self-serving scheme that is unsupported by the Foreclosure Act and the Subdivision Act.

B. The Subdivision Act cannot be reasonably interpreted to penalize and remedy that which the Foreclosure Act expressly requires.

It is undisputed in this case that Plaintiffs acquired Lot 27 in an “As Is” tax foreclosure auction without first researching publicly available records to determine the status of the property and whether it was a buildable lot. (CP 143-148); (Verbatim Rep. of Proceedings 5/1/15, p. 38:15-20). Moreover, it is undisputed that prior to bidding twenty-six times on the property at auction, Plaintiffs expressly agreed to terms of sale detailing the fact that the auction was not a traditional real estate sale and that there were no warranties of any kind. (CP 143-144, 201-220). Faced with these undisputed facts, Plaintiffs are left with the un-enviable and circular argument that the Subdivision Act law somehow penalizes and seeks to remedy that which the Foreclosure Act explicitly requires⁶. (Brief of Appellants, pp. 10-12).

Although Plaintiffs appear to acknowledge that Subdivision Act and Foreclosure Act regulate entirely *different* conduct and subject matter,

⁶ Under Plaintiffs’ so-called harmonious statutory interpretation, county treasurers would be **“guilty of a gross misdemeanor”** any time they fulfilled their statutory obligation to foreclose upon a lot that had not been property subdivided pursuant to RCW 58.17 and/or county code. RCW 58.17.300

they argue that the Subdivision Act remedies apply, regardless of the conflict with the Foreclosure Act, simply because it was enacted more recently (Brief of Appellants, p. 11). As set forth below, this argument fails because it ignores that the Subdivision Act's remedy of "rescission" is impossible in the foreclosure context. Moreover, Washington's canons of statutory construction require that mandatory and specific requirements of the Foreclosure Act (which affords no refunds) supersede generally applicable requirements of the Subdivision Act. Finally, Washington's canons of statutory construction strongly disfavor circular and tortured interpretations that lead to absurd and/or impossible results. *Belenski v. Jefferson County*, WA. Sup. Ct. Slip Opinion, 92161-0, pp. 8-10 (2016) (rejecting a literal reading and interpretation of a statute because it would lead to an absurd result); *Cannon v. Dep't of Licensing*, 147 Wn.2d 41, 57, 50 P.3d 627 (2002) ("This court will avoid a literal reading of a provision if it would result in unlikely, absurd, or strained consequences."), *Bartz v. Department of Corrections*, 173 Wn. App. 522, 538, 297 P.3d 737 (2013); *State v. McDonald*, 183 Wn. App. 272, 333 P.3d 451 (2014) citing *State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994) ("[W]e must avoid constructions that yield unlikely, strange or absurd consequences."); *Upjohn v. Russell*, 33 Wn. App. 777, 780, 658 P.2d 27 (1983). As set forth below, Plaintiff's tortured and strained statutory interpretation would

result in precisely the strange and absurd consequences that Washington courts have long sought to avoid.

1. The legislature did not intend the Subdivision Act to penalize and remedy mandatory functions of local government required by the Foreclosure Act.

In their effort to convince this Court that the Subdivision Act penalizes that which the Foreclosure Act requires, Plaintiffs have ignored the plain language of both statutes. Specifically, Plaintiffs ignore the predicate language that RCW 58.17.210 provides compensatory and recessionary remedies that result from selling property in “violation” of the Subdivision Act.

“All purchasers' or transferees' property shall comply with provisions of this chapter and **each purchaser or transferee may recover his or her damages from any person, firm, corporation, or agent selling or transferring land in violation of this chapter** or local regulations adopted pursuant thereto, including any amount reasonably spent as a result of inability to obtain any development permit and spent to conform to the requirements of this chapter as well as cost of investigation, suit, and reasonable attorneys' fees occasioned thereby.”

RCW 58.17.210 (*emphasis added*).

RCW 58.17.300 further provides ***criminal*** penalties for “violating” the Subdivision Act.

“Any person, firm, corporation, or association or any agent of any person, firm, corporation, or association who

violates any provision of this chapter or any local regulations adopted pursuant thereto relating to the sale, offer for sale, lease, or transfer of any lot, tract or parcel of land, **shall be guilty of a gross misdemeanor and each sale, offer for sale, lease or transfer of each separate lot, tract, or parcel of land in violation of any provision of this chapter or any local regulation adopted pursuant thereto, shall be deemed a separate and distinct offense.**”

RCW 58.17.300 (*emphasis added*).

The plain language of these statutes, the use of word “violate”, and the associated *criminal* penalties necessarily require that a seller subject to the terms and remedies of the Subdivision Act must have some ability to control the legal status of the property prior to sale or, at the very least, a choice in whether to sell the property and thus “violate” the law. None of these factors are present here.

In this case, it is undisputed that the Foreclosure Act imposed a *mandatory* duty on the Clark County Treasurer to foreclose upon and auction *any* property where the real property taxes are more than three years delinquent, regardless of its legal status. *Id.* (Brief of Appellants, p.

11). The Foreclosure Act provides in relevant part:

“After the expiration of three years from the date of delinquency, when **any** property remains on the tax rolls for which no certificate of delinquency has been issued, **the county treasurer must proceed to issue certificates of delinquency on the property** for all year’s taxes, interest and costs.”

RCW 84.64.050 (*emphasis added*)

“The county treasurer **shall** immediately after receiving the order and judgment of the court **proceed to sell the property as provided in this chapter to the highest and best bidder for cash.** The acceptable minimum bid **shall** be the total amount of taxes, interest, and costs.”

RCW 84.64.080 (*emphasis added*)

Put simply, the Clark County Treasurer had no choice or discretion in whether to auction Lot 27. *Id.* Further, Clark County never owned Lot 27 so that it could have brought the property into compliance with the Subdivision Act and/or Clark County Code and thus avoided a “violation” of RCW 58.17.210. (CP 99-118).

In attempting to harmonize RCW 58.17 and RCW 84.64, Plaintiffs argue that county treasurers are both *required* to foreclose and auction illegally subdivided lots (theoretically exposing themselves to civil and criminal liability) and are also *required* to later “rescind” such transactions at the option of the auction bidder. (Brief of Appellants, pp. 11-12). This is precisely the circular, tortured and absurd interpretation that the Washington Supreme Court has repeatedly held should be avoided in construing and attempting to harmonize statutes. *Belenski* at 8-10, *Cannon* at 57, *Bartz* at 538; *McDonald*, at 278, *Contreras* at 747; *Upjohn* at 780.

In their effort to harmonize the terms of RCW 58.17.210 and RCW 84.64.050-.080, Plaintiffs rely upon a flawed statutory analysis that

ignores the absurdity of the outcome. (Brief of Appellants, pp. 10-13). Plaintiffs argue that these statutes may be harmonized simply by assuming that the later enacted Subdivision Act's lack of a "foreclosure auction exception" is an expression of the legislature's intent to selectively abrogate the longstanding doctrine of *caveat emptor* that would otherwise apply to such auctions. (Brief of Appellants, p. 11). Plaintiffs do not cite any legislative history that would suggest that the legislature intended to regulate tax foreclosure auctions when they enacted the Subdivision Act.

Ultimately, RCW 58.17.210 and RCW 84.64.050 - .080 may only be harmonized by recognition that they regulate entirely different conduct and market places. The *plain language* of RCW 58.17.210 demonstrates that it applies to traditional voluntary real estate transactions and provides penalties for unlawful and volitional transactions that "violate" the Subdivision Act and are capable of being "rescinded." The penalties and remedies afforded by RCW 58.17.210 are necessarily predicated upon real estate transactions where the seller has the ability to control the status of the property, or at least a *choice* in whether to sell the property and thus violate the law. Neither of these predicates is present in this case, precluding the application of RCW 58.17.210 and its remedies.

2. The plain language of RCW 58.17.210 demonstrates that it is not applicable because “rescission” is not a remedy that is possible in the foreclosure context.

It is well settled in Washington that courts must give words their plain and ordinary meaning to determine the meaning and applicability of a statute. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010); *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002); *Ravenscroft v. Wn. Water Power Co.*, 136 Wn.2d 911, 920–21, 969 P.2d 75 (1998). This is especially true for legal terms of art that have a commonly understood meaning. Washington appellate courts may look to legal dictionaries to determine the plain and ordinary meaning of such terms. *American Continental Ins. Co. v. Steen*, 151 Wn.2d 512, 519, 91 P.3d 864 (2004); *Alliance One Receivables Management, Inc. v. Lewis*, 180 Wn.2d 389, 395, 325 P.3d 904 (2014). Black's Law Dictionary defines “rescission” to mean:

“A party's unilateral **unmaking of a contract** for a legally sufficient reason, such as the other party's material breach, or a judgment rescinding the contract; VOIDANCE. • **Rescission** is generally available as a remedy or defense for a nondefaulting party and is accompanied by restitution of any partial performance, **thus restoring the parties to their precontractual positions.**”

Black's Law Dictionary (10th ed. 2014), rescission.

Moreover, the Washington Supreme Court has held that when a statute, such as RCW 58.17.210, does not define a term then “it is presumed that the Legislature intended it to mean what it did at common law.” *In re Brazier Forest Products, Inc.*, 106 Wn.2d 588, 594-95, 724 P.2d 970 (1986). To this end, Washington common law also confirms that the term “rescission” is a mutual remedy in the context of RCW 58.17.210, and that requires both parties to be returned to their pre-contract position for it to apply. *Busch v. Nervik*, 38 Wn.App 541, 547, 687 P.2d 872 (1984).

“Rescission means to abrogate or annul and requires the court to fashion a remedy to restore the parties to the relative positions they would have occupied if no contract had ever been made. Rescission is an equitable remedy and requires the court to fashion an equitable solution.”

Id. (emphasis added)

The inapplicability of RCW 58.17.20 is conclusively established because the remedy of “rescission” is impossible in this case.⁷ This impossibility exists because: (1) Clark County didn’t own Lot 27 before the tax auction; and (2) The auction proceeds were immediately distributed to taxing authorities and the prior owner of Lot 27 as *mandated*

⁷ Plaintiffs do not appear to dispute that Clark County would be in a different and worse position that it was in prior to the foreclosure auction under Plaintiffs’ conception of “rescission.” Under Plaintiffs conception of ‘rescission’ Plaintiffs would deed Lot 27 to Clark County and, in return, Clark County would pay Plaintiffs the amount of their winning auction bid from county general funds. (CP 210).

by RCW 84.64.080, meaning that any refund payment to Plaintiffs would result in a net loss to Clark County simply because it followed the requirements of the Foreclosure Act.⁸ It is also worth noting that any refund amount paid under Plaintiffs concept of “rescission” would be inherently arbitrary and inequitable because Clark County had no role in negotiating or otherwise setting the Plaintiffs winning auction bid of \$28,600.⁹ This figure was arrived at through two days of competitive bidding between Plaintiffs and other interested buyers. (CP 143-44, 150-51). Put simply, Plaintiffs’ mistaken concept of “mutual” rescission would result in Clark County owning Lot 27 for the first time ever and incurring a net loss of at least \$28,600. Whatever the remedy proposed by Plaintiffs, it cannot be termed “rescission” and thus is not authorized by RCW 58.17.210 in the tax foreclosure context. Ultimately, Plaintiffs ask this Court to ignore the impossibility of rescission and adopt an absurd

⁸ There is no theory of recovery that would entitle Clark County initiate a third party action against the prior owner of the property to recover the surplus tax auction proceeds that were lawfully applied for and paid pursuant to RCW 84.64.080.

⁹ Plaintiffs’ concept of “rescission” in the foreclosure auction context also presents enormous potential for fraud and collusion between the delinquent taxpayer and auction bidder. Under Plaintiffs’ interpretation, a taxpayer could stop paying taxes on an illegal lot, forcing the property into foreclosure, and collude with a foreclosure auction bidder to bid up the property far beyond its value. Following the sale, pursuant to RCW84.64.080, the delinquent taxpayer would be entitled to receive the surplus funds for his property after the auction. All the while, under Plaintiffs’ interpretation of RCW 58.17.210, the auction bidder would be entitled to a full refund of his auction bid from county funds.

application of the Subdivision Act so that they may circumvent the doctrine of *caveat emptor*. This Court should reject this invitation.

3. Washington’s canons of statutory construction give preference to the specific and mandatory terms of RCW 84.64, which does not provide for rescission or refund, over the more general terms of RCW 58.17.

Where two statutes that govern different subject matter cannot be harmonized, Washington’s canons of statutory construction require that the more specific and mandatory statute supersede the general statute. *In re Estate of Kerr*, 134 Wn.2d 328, 343, 949 P.2d 810 (1998). In the context of a tax foreclosure auction the more specific and mandatory terms of the Foreclosure Act (which does not provide for any refund or rescission), supersede the more general and optional terms of the Subdivision Act.

The terms of RCW 84.64.050-.080 provide an *extremely specific* and *mandatory* process by which county treasurers must administer the tax foreclosure process to collect tax revenue and fund the critical functions of government. In particular, RCW 84.64.050 provides in relevant part that:

- (1) After the expiration of three years from the date of delinquency, when **any property** remains on the tax rolls for which no certificate of delinquency has been issued, **the county treasurer must proceed to issue certificates of delinquency on the property**

to the county for all years' taxes, interest, and costs.

RCW 84.64.050(1) (*emphasis added*)

This statute goes on to proscribe the step-by-step process the treasurer must follow in initiating and maintaining tax foreclosure proceedings. *Id.* Significantly, this statute requires treasurers to initiate proscribed foreclosure proceedings for any property where taxes are three years delinquent, without regard to its legal status. *Id.* Similarly, RCW 84.64.080 provides specific direction for administering a tax foreclosure auction, again without regard to a property's legal status, and without any mechanism to provide dissatisfied auction bidders with a refund:

[...] “The county treasurer **shall** immediately after receiving the order and judgment of the court proceed to sell the property as provided in this chapter to the highest and best bidder for cash. The acceptable minimum bid **shall** be the total amount of taxes, interest, and costs. All sales **shall** be made at a location in the county on a date and time (except Saturdays, Sundays, or legal holidays) as the county treasurer may direct, and **shall** continue from day to day (Saturdays, Sundays, and legal holidays excepted) during the same hours until all lots or tracts are sold, after first giving notice of the time, and place where such sale is to take place for ten days successively by posting notice thereof in three public places in the county, one of which **shall** be in the office of the treasurer.”

RCW 84.64.080 (*emphasis added*).

In contrast to the foreclosure specific and mandatory terms of RCW 84.64.050-.080, the terms of RCW 58.17.210 provide an optional remedy that is generally applicable to traditional real-estate sales and transfers that convey illegally sub-divided lots, but is not specific to foreclosure proceedings.

“[...] each purchaser or transferee may recover his or her damages from any person, firm, corporation, or agent selling or transferring land in violation of this chapter or local regulations adopted pursuant thereto, including any amount reasonably spent as a result of inability to obtain any development permit and spent to conform to the requirements of this chapter as well as cost of investigation, suit, and reasonable attorneys' fees occasioned thereby. Such purchaser or transferee may as an alternative to conforming his or her property to these requirements, rescind the sale or transfer and recover costs of investigation, suit, and reasonable attorneys' fees occasioned thereby.”

RCW 58.17.210 (*emphasis added*).

Pursuant to Washington’s canons of statutory construction, this Court should give effect to the specific mandatory terms of RCW 84.64, which do not provide for refunds or warranties regarding the property being auctioned. *Id.* These terms, especially when combined with the well-established doctrine of *caveat emptor*, supersede the generalized and non-foreclosure specific terms of RCW 58.17.210.

C. Plaintiffs' common law rescission claims also fail because rescission is impossible in the foreclosure context and because there was no failure of consideration in this case.

As discussed in detail above, rescission is not possible in the foreclosure context because rescission is a mutual equitable remedy that requires that both parties be returned to the position they were in prior to the contract.

Even assuming *arguendo* that rescission were possible in the tax foreclosure context and the doctrine of *caveat emptor* did not apply, there is no evidence here that the Plaintiffs acquisition of Lot 27 amounted to a “failure of consideration” giving rise to such a remedy under Washington law. Plaintiffs claim that the current illegal lot status of Lot 27 “goes to the root of the Treasurer’s Tax Deed because it defeats plaintiffs’ ability to construct a residence [...]” (Brief of Appellant, P. 17). However, all of the cases relied upon by Plaintiff are inapposite because they arise from traditional real estate transactions between a willing seller and a willing buyer that *negotiated* the consideration to be exchanged and the terms of a sale. *Shook v. Scott*, 56 Wn.2d 351, 367, 353 P.2d 431 (1960); *Barber v. Rochester*, 52 Wn.2d 691, 328 P.2d 711 (1958); *Knatvold v. Rydman*, 28 Wn.2d 178, 182 P.2d 9 (1947); *Capital Savings & Loan Ass’n v. Convey*, 175 Wn. 224, 27 P.2d 136 (1947). Additionally, and most significantly, in

each of these cases there was at least some evidence of the parties' intent from which the court could determine if there had indeed been a failure of consideration. Plaintiffs have cited no such evidence in this case.

In this case, unlike the cases relied upon by Plaintiffs, Clark County was not a willing seller because it was compelled to foreclose upon and auction the property pursuant to RCW 84.64.080. (CP 152-158). Moreover, there was no negotiated consideration because Plaintiffs *unilaterally* selected Lot 27 and the price to be paid without performing any pre-auction due diligence. (CP 143-144, 150-151).

Plaintiffs' argument that there has been a failure of consideration also fails because Lot 27 remains viable for many uses under Clark County Code.¹⁰ Plaintiffs presumably sought to acquire **all** of these potential uses for Lot 27 in the tax foreclosure auction, not just the ability to immediately build a single family home on the property.¹¹ These

¹⁰ CCC 40.210.020(A) provides that property zoned R-10, like Lot 27, is intended for uses in addition to residential living. Specifically, this section provides in relevant part that "Natural resource activities *such as farming and forestry are allowed and encouraged in conjunction with the residential uses in the area.* These areas are subject to normal and accepted forestry and farming practices." *Id.* (emphasis added)

¹¹ Clark County was not in a position to know how Plaintiffs intended to use Lot 27 prior to or during the tax foreclosure auction and thus was not in any position to warrant or guarantee that such any use was permitted. (CP 143-148). Plaintiffs specifically acknowledged the lack of warranty and the possibility that lots were not "buildable" prior to participating in the tax foreclosure auction (CP 146)

alternative available uses include farming, and forestry activities, as well as conservation and recreation. *Id.* Moreover, Lot 27 currently has value in that it may be combined with adjacent properties through sale or acquisition to form a larger lot, for which even more uses may be available.¹² Finally, in addition to these currently available uses, Plaintiffs could immediately seek a public interest exemption to the current legal lot determination under Clark County Code and/or a re-zone of the property that could further expand or change these uses. *See* CCC 40.520.020(c). Plaintiffs have acknowledged in this case that they are simply unwilling to pursue these available options, which could expand the potential uses of Lot 27. (Verbatim Rep. of Proceedings 5/1/15, p. 35:17 - p. 36:6).

THE COURT: Now, you mentioned an illegal lot. I mean, the lot is a lot. **But it can't be used for certain purposes at this point; correct?**

MR. ERIKSON: Let me clarify that. The property is zoned single-family residential. That's what it can be used for. **Plaintiff cannot -- well, plaintiff could apply for rezone, but it would be very difficult to It goes in a whole large process of review that's -- it's big.**

THE COURT: That he hasn't done at this point.

¹² Plaintiffs have not offered any admissible evidence to suggest that these alternative permitted uses are unavailable.

MR. ERIKSON: Doesn't want to.

Id.

Ultimately, there is no evidence of a failure of consideration in this case and all of the property rights that Plaintiffs acquired in the tax foreclosure auction for a price of their choosing remain available to them. For this reason and because rescission is impossible in the tax foreclosure context, Plaintiffs' common law rescission claims were properly dismissed by the trial court.

D. Plaintiffs' substantive due process claims fail because they have not been regulated by Clark County or RCW 84.64 and because their participation in the tax foreclosure auction was not "unduly oppressive."

Plaintiffs contend that Clark County's "*enforcement*" of RCW 84.64 has deprived them of substantive due process rights guaranteed by the state and federal constitutions.¹³ (Brief of Appellants, p. 21). Plaintiffs claim that this enforcement arose from the fact that Clark County did not affirmatively research Lot 27's legal history and provide them with

¹³ Although Plaintiffs appear to assert claims for damages under the Washington State Constitution, "Washington courts have consistently refused to recognize a 724 cause of action in tort for violations of the state constitution." *Janaszak v. State*, 173 Wn.App. 703, 722, 297 P.3d 723 (2013); *Hannum v. Washington State Dept. of Licensing*, 144 Wn.App. 354, 362, 181 P.3d 915 (2008).

records that were already publically available from the county.¹⁴ *Id.* Plaintiffs apparently claim that Clark County was constitutionally obligated to search for and provide these records prior to the foreclosure auction even though it is undisputed that they agreed to terms of auction that stated exactly the opposite. (CP 143-148). Despite Plaintiffs' bald claims, the undisputed facts of this case show that Clark County has not taken any regulatory or enforcement action against Plaintiffs pursuant to RCW 84.64, Clark County Code or any other statute. Rather, the undisputed facts demonstrate that Plaintiffs voluntarily participated in an "As Is / Where Is" tax foreclosure auction and purchased property of their choosing for a price of their choosing. (CP 143-144, 150-158). Moreover, even if this voluntary auction scenario could somehow be construed as "enforcement," it does not come close being "unduly oppressive" and thus cannot give rise to an actionable substantive due process claim.

The Washington Supreme Court has adopted a three-part test to be applied to determine whether an ordinance or other government action constitutes a violation of a landowner's substantive due process rights guaranteed by the United States Constitution. *Presbytery of Seattle v. King County*, 114 Wash 2d 320, 330, 707 P.2d 907,913 (1990). The

¹⁴ Following the foreclosure auction, Plaintiffs requested and promptly received a copy of the 1999 Development Review Decision from the Clark County Department of Community Development.

Presbytery Court held that the court evaluating a substantive due process claim must consider:

“(1) whether the regulation aims to achieve a legitimate public purpose, (2) whether the means adopted are reasonably necessary to achieve that purpose, and (3) whether the regulation is unduly oppressive on the property owner”

Id.

The *Presbytery* Court explained that the question of whether a regulation is unduly oppressive “lodges wide discretion in the court and implies a balancing of the public's interest against those of the regulated landowner.” *Id.* The *Presbytery* Court also suggested factors for the court to consider when balancing the interests of the public and the landowner:

“We have suggested several factors for the court to consider to assist it in determining whether a regulation is overly oppressive, namely: the nature of the harm sought to be avoided; the availability and effectiveness of less drastic protective measures; and the economic loss suffered by the property owner.”

Id. at 331.

The *Presbytery* Court went on to adopt the following non-exclusive factors for a court to balance in determining whether the regulation is “unduly oppressive”:

“On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be

relevant. On the owner's side, the amount and percentage of value loss, **the extent of remaining uses**, past, present and future uses, temporary or permanent nature of the regulation, **the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.**”

Id.

This Court should balance these factors alongside the undisputed fact that the Plaintiffs affirmatively chose to participate in the subject tax foreclosure auction, expressly agreed to its “As Is / Where Is” terms of sale and performed zero pre-auction due diligence. Additionally, this Court must account for the fact that Washington Appellate Courts have repeatedly held that inherently speculative tax foreclosure auctions are subject to the doctrine of *caveat emptor* as a matter of law. *See Pierce County v. Newbegin*, 27 Wn.2d 451, 178 P.2d 742 (1947); *Shelton v. Kikitat County*, 152 Wn. 193, 277 P.839 (1929); *Anderson v. King County*, 200 Wn. 354, 93 P.2d 284 (1939); *Hilton v. DeLong*, 188 Wn. 162, 61 P.2d 1290 (1936).

In support of their argument that they have been *unduly oppressed* and required to bear a public burden, Plaintiffs cite cases are wholly inapplicable to the facts of this case. (Brief of Appellants, p. 19, 26-29, relying upon *Weden v. San Juan County*, 135 Wn.2d 678, 706, 958 P.2d 273 (1998); *Orion v. State*, 109 Wn.2d 621, 648-49, 747 P.2d 1062

(1987); *Guimont v. Clarke*, 121 Wn.2d 586, 610-11, 854 P.2d 1 (1993), *Heavens v. King County*, 66 Wn.2d 558, 404 P.2d 453 (1965); *Sinatra v. Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992); *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993); *Rivett v. Tacoma*, 123 Wn.2d 573, 870 P.2d 299 (1994)).

In our case, unlike the above referenced cases, Plaintiffs voluntarily acquired Lot 27 in an “As Is / Where is” tax foreclosure auction and was not been *required* by Clark County to bear any burden, let alone one that should be borne by the public. Plaintiffs voluntarily acquired Lot 27 in a tax foreclosure auction subject to any development and/or use limitations it might have. (CP 146-148). As set forth below, a balancing of the public and private *Presbytery* factors confirms that Plaintiffs have not been “unduly oppressed.”

Public Interest Side of *Presbytery* Analysis:

On the public’s side of the *Presbytery* balancing test, Plaintiffs have conceded that RCW 84.64 addresses the public problem of tax delinquency. (Brief of Appellants, p. 21). Further, it is beyond dispute that tax delinquency and the resulting shortfalls in revenue for state and local government is a serious public problem that has wide-reaching implications for government’s ability to provide critical services to their communities. To this end, the Washington Supreme Court has held that:

“It is necessary for the perpetuity of the government that the public revenues be collected, and the legal machinery set up by the Legislature for the collection of taxes due the state and its legal subdivisions is favored by the courts as in aid of a most important governmental function, namely, that of raising revenue necessary to maintain and carry on the government.”

Schultz v. Kolb, 189 Wn. 187, 192, 64 P.2d 79 (1937).
(*emphasis added*) (internal citations omitted).

Although Plaintiffs are inexplicably unwilling to concede the seriousness of the problem of tax delinquency, they do at least acknowledge that RCW 84.64 contributes to the solution of this problem by requiring a tax foreclosure auction. (Brief of Appellants, p. 21).

The *Presbytery* balancing analysis requires Plaintiffs to *prove* that there is a feasible, less oppressive alternative in order to prevail on a substantive due process claim. In this case, Plaintiffs have the burden of proving that there is a less oppressive way to foreclose upon and auction property than administering a voluntary “As Is / Where Is” tax foreclosure auction. Plaintiffs have offered zero evidence addressing the feasibility of any other alternatives and/or whether those alternatives would measurably reduce the so-called “oppressiveness” of a voluntary tax foreclosure auction. Without any such evidence Plaintiffs cannot meet their burden proof in this case. Accordingly, the procedures required by RCW 84.64

and implemented should be presumed to be the most feasible and least oppressive options available.

Private Property Owner Side of *Presbytery* Analysis:

On the property owner's side of the *Presbytery* balancing test, the court must consider (1) the amount and percentage of the value loss; (2) the extent of the remaining uses (past, present and future); (3) "the extent to which the owner should have anticipated such regulation"; and (4) the feasibility of altering planned uses. Based upon the undisputed facts of this case, each of these balancing factors is independently fatal to Plaintiffs' substantive due process claims.

1. There has been no loss of value for Plaintiffs:

With regard to the loss of the percentage of the value loss, Plaintiffs have not cited any *evidence* that Lot 27 has lost any value since they acquired it or that they paid too high a price. Plaintiffs continue to own and possess 100% of the property rights that they acquired when they voluntarily purchased Lot 27 in an "As Is / Where Is" tax foreclosure auction for the price of their choosing. (CP 35-52, 143-151, 154). Put simply, Plaintiffs placed their own value on Lot 27 and acquired it subject to whatever limitations it may have. (CP 146-148).

2. There are many remaining uses for Lot 27:

There are a many remaining potential uses for Lot 27, all of which were foreseeable to Plaintiffs and presumably bargained for (via competitive bidding) at the time they purchased the property. As discussed in detail above, Lot 27's can currently be used for many activities, including farming, forestry, conservation and recreation. In addition, Lot 27 may also be combined with adjacent property through sale, acquisition, or boundary line adjustment to create a larger lot. Plaintiffs bargained for all of these opportunities when they speculatively acquired Lot 27 in the "As Is / Where Is" tax foreclosure auction without performing any pre-auction due diligence.

3. Plaintiffs should have anticipated regulation under RCW 84.64, Clark County Code and/or Lot 27's 1999 legal lot determination.

Presbytery suggests that courts also consider whether a plaintiff should have anticipated the regulation that they complain of. *Presbytery* at 331. In the present case, to the extent Plaintiffs have been regulated at all, they should have anticipated the (1) the operation of the RCW 84.64; (2) The application of the doctrine of *caveat emptor* to the "As Is / Where Is" tax foreclosure auction; (3) the application of Clark County Code to Lot 27; (4) and the limitations of Lot 27.

With regard to the terms of RCW 84.64 and the execution of the subject tax foreclosure auction, Plaintiffs expressly agreed to the terms of sale that informed them that the sale was “As Is/ Where Is” and that the property being auctioned may not be “buildable.” (CP 146) Additionally, Plaintiffs were presumably aware of Washington’s longstanding application of the doctrine of *caveat emptor* to foreclosure auctions. *See Shelton, see also Anderson, see also Hilton.* Accordingly, Plaintiffs should have anticipated that Lot 27 may have limitations and that tax auctions were non-refundable as a matter of law.

Plaintiffs should have also been aware of the limitations of Clark County Code and Lot 27. In particular, it is significant that Lot 27 is a 2.8 acre lot in a 10 acre lot zone and that this information is readily available on Clark County’s Property Information Website. (CP 305-306, 341). This zoning incongruity alone should have *immediately* put Plaintiffs on notice that Lot 27 could have significant limitations and that due diligence and caution was necessary. The undisputed facts of this case demonstrate that had Plaintiffs investigated Lot 27’s status prior to bidding on the property, they would have been aware of its limitations under Clark County’s Code and the 1999 Legal Lot Determination. (CP 331). These property records are publicly maintained and provided to anyone who asks for them by the Clark County Department of Community Development (CP 381-382). If

Plaintiffs had merely inquired about the legal lot status of Lot 27 prior to the auction, as they did after the sale, they would have promptly received a copy of the legal lot determination and immediately recognized Lot 27's limitations. (CP 331). Unfortunately, Plaintiffs did not request this information until after the tax foreclosure auction, at which point they promptly realized Lot 27's limitations. (CP 328, 331). (Verbatim Rep. of Proceedings 5/1/15, p. 38:15-20).

4. Plaintiffs could apply for a change of Lot 27's current status and there is zero evidence in this case that such a change is infeasible.

The *Presbytery* Court further suggests consideration of the feasibility of altering the uses of the property in question when conducting a substantive due process balancing analysis. *Presbytery* at 331. Despite having the burden of proof in this case, Plaintiffs have offered no evidence regarding the feasibility of altering the present or planned uses for Lot 27. Instead, Plaintiffs' counsel has conceded to this Court that requesting such an alteration of the uses for Lot 27 is possible, but that his clients simply don't want to pursue this option. (Verbatim Rep. of Proceedings 5/1/15, p. 35:17 - p. 36:6). Given this concession, and in the absence of any admissible evidence, Plaintiffs are unable to show under the *Presbytery* balancing analysis that it is infeasible to alter the uses of Lot 27.

When all of the public and private *Presbytery* factors are weighed together they demonstrates conclusively that Clark County's foreclosure auction advanced a legitimate government interest and Plaintiffs were not "unduly oppressed" when they voluntarily participated in an "As Is / Where Is" tax foreclosure auction without performing any due diligence.

E. Plaintiffs have not been deprived of any right or interest giving rise to a violation or claim under the Civil Rights Act.

Contrary to Plaintiffs' broad and ambiguous gestures to the United States Constitution and the Civil Rights Act, there is no federal constitutional right to receive a guarantee, warranty or disclosure that property acquired in an "As Is / Where Is" tax foreclosure action will be fit for any particular purpose. The Washington Supreme Court has recognized that the burden of proof in §1983 due process claims may well be even higher than the substantial burden set forth for state due process claims under *Presbytery. Robinson v. City of Seattle* 119 Wn.2d 34, 56, 830 P.2d 318 (1992) ("What must be proved by a section 1983 plaintiff may involve more than is necessary for establishing a right to relief under *Presbytery*. In many cases this means that burdens will be more difficult [...]"). The *Robinson* Court has held that in order for a plaintiff to challenge a government action or regulation in a §1983 action on

substantive due process grounds, they “must plead and prove that the challenged government action is wholly arbitrary and capricious or irrational, or utterly fails to serve a legitimate purpose.” *Robinson* at 61-62. Similarly, the *Robinson* Court held that a land use decision gives rise to a substantive due process cause of action only if it is invidious or irrational or arbitrary. *See Robinson* at 60-61 (citing *R/L Associates Inc. v. City of Seattle*, 113 Wn.2d 402, 412, 780 P.2d 838 (1989), *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir.1988)).

As set forth above, it is undisputed that the tax foreclosure act serves a legitimate public purpose and that the subject foreclosure auction of Lot 27 advanced that public purpose. *Supra* at 38-39, (Appellants Brief, p. 21). As stated above, Plaintiffs have not been deprived of an interest by RCW 84.64 or Clark County’s application thereof. *Supra* at 40-41. Similarly, for many of the same reasons that RCW 84.64 was not “unduly oppressive,” it is also not “invidious or irrational or arbitrary.” *Supra* at 33-42. Rather, the undisputed facts demonstrate that RCW 84.64 and Washington’s common law provide for a completely voluntary tax foreclosure auction that empowers interested parties to research, bid on, and acquire tax foreclosure property subject to the doctrine of *caveat emptor*. As set forth above, this is not an arbitrary or irrational system because it facilitates the collection of delinquent taxes and the prompt and

certain recovery of equity for the delinquent tax payer, while providing the foreclosure auction bidder with total control.

F. Plaintiffs' *facial* procedural due process challenges to RCW 84.64 cannot overcome the presumption of constitutionality.

Washington appellate courts have repeatedly held that statutes are presumptively constitutional and that a plaintiff challenging the constitutionality of a statute must prove “beyond a reasonable doubt” that there is “no set of circumstances exists in which the statute, as currently written, can be constitutionally applied.” *Morrison v. Dept of Labor Indust.*, 168 Wn.App 269,272, 277 P.3d 675 (2012); *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004); *Didlake v. Washington State*, 186 Wn.App 417, 423, 345 P.3d 43 (2015). In particular, the *Didlake* Court recently held that:

“A reviewing court **presumes that a statute is constitutional, and the party challenging it bears the burden of proving otherwise beyond a reasonable doubt.** A party may bring a facial or an as-applied challenge. To prevail in a facial challenge, a party must show that “no set of circumstances exists in which the statute, as currently written, can be constitutionally applied.”

Didlake at 423. (*emphasis added*)

The Washington Court of Appeals has held that “due process is flexible and calls for such procedural protections as the particular situation

demands.” *Morrison* at 272 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). The *Didlake* Court held:

“To determine what procedural protections due process requires in a particular situation, a court must consider three factors: (1) the private interest affected, (2) the risk that the relevant procedures will erroneously deprive a party of that interest, and (3) any countervailing governmental interests involved.”

Didlake at 423 (citing *Mathews*, 424 U.S. at 334–35, 96 S.Ct. 893).

With regard to the first and second factor, the *facial* terms and procedures of RCW 84.64 do not affect or deprive a party of the value of the real property interest that is acquired at a voluntary “As Is / Where Is” tax foreclosure auction. This is true because the facial terms of RCW 84.64 do not require participation in the foreclosure auction and do not prevent or otherwise restrict a party from performing pre-auction due diligence. Rather, RCW 84.64.050 provides the mechanism for a party to perform due diligence and allows a party to acquire property at a tax foreclosure auction that is subject to the doctrine of *caveat emptor*. See *Pierce County, Shelton, Anderson, and Hilton*.

A party that mistakenly acquires an illegal lot after failing to perform pre-auction due diligence has unfortunately deprived themselves of their own interest and, as a matter of law, cannot reasonably attribute

this loss to any procedure contained in or omitted from RCW 84.64. Moreover, to the extent that RCW 84.64 presents any risk that a party participating in a voluntary foreclosure auction could be deprived of an interest, that risk is assumed in the inherently speculative nature of *caveat emptor* tax foreclosure auctions. Contrary to Plaintiffs' claims, there is no evidence that RCW 84.64 *facially* contains or omits a procedure that *erroneously* deprives a party that mistakenly purchases property of a private interest after they failed to perform any due diligence.

With regard to the third factor, Plaintiffs concede that there is a government interest in collecting delinquent property taxes. (Appellants Brief, p. 21). However, there is also a strong government interest in protecting the interests of the delinquent tax payer. *Pierce County v. Desart*, 9 Wn.App 760, 762, 515 P.2d 500, 552 (1973) ("Protection of the rights of delinquent taxpayers is the paramount policy of the statute"). In providing for a completely voluntary auction that does not restrict any prospective bidder from performing pre-auction due diligence, RCW 84.64 advances both of these important governmental interests while also protecting the interests of those that choose to speculate on tax foreclosure property.

When these factors are balanced together, they demonstrate that the facial terms of RCW 84.64 and the voluntary *caveat emptor* tax

auction that it contemplates provide all of the procedural protections due in a tax foreclosure context. Clark County is entitled to a presumption that RCW 84.64 is constitutional and Plaintiffs have not offered evidence to overcome their burden of showing “beyond a reasonable doubt” that that there are “no set of circumstances exists in which [RCW 84.64], as currently written, can be constitutionally applied.” *Morrison* at 272.

G. Plaintiffs *as applied* procedural due process claims are not ripe and nonetheless amount to a facial challenge of RCW 84.64.

Plaintiffs’ *as applied* procedural due process claims are not ripe because they did not moved for summary judgment under this theory in the trial court.¹⁵ With respect to their procedural due process claims, Plaintiffs only moved offensively for summary judgment a under *facial* invalidity theory. (CP 266). In contrast, Clark County defensively moved for and was granted summary judgment under *both* theories. (298-301). Plaintiffs may not assert new arguments or theories of liability for the first time on appeal as appellate court’s review is limited to those claims and issues that were adjudicated by the trial court. *State v. Stoddard*, 192

¹⁵ Plaintiffs only moved for summary judgment on their procedural due process claims under a *facial* challenge theory and did not move for summary judgment under an *as applied* theory. (CP 266): In particular, with regard to their procedural due process claims, Plaintiffs argued only that they were “denied due process because Chapter 84.64 affords no mechanism to challenge Treasurer’s Tax Deeds which convey illegal parcels. (CP 266, Plaintiffs Second Motion for Summary Judgment).

Wn.App. 222, 226, 366 P.3d 474 (2016). Moreover, because Plaintiffs did not move for summary judgment on an *as applied* basis, the trial court could not possibly have erred in failing to grant them summary judgment on this basis. Accordingly, while the trial court's award of summary judgment to Clark County dismissing Plaintiffs' *as applied* theories may be affirmed on appeal, Plaintiffs may not prevail on these claims on appeal unless and until they are first adjudicated by the trial court.

Notwithstanding the issue of ripeness, Plaintiffs' so-called *as applied* challenges to RCW 84.64 and Clark County Code are really just thinly disguised *facial* challenges to RCW 84.64. Specifically, Plaintiffs' *as applied* challenge is premised upon the fiction that Clark County owed them specific disclosures in advance of the tax foreclosure auction, despite Plaintiffs acceptance of "As Is / Where Is" terms that provided to the contrary. Even if an *as applied* claim could be construed from Plaintiffs' claims, the application of the above referenced *Didlake* procedural due process factors demonstrate Plaintiffs were provided all the process that they were due, and more, under RCW 84.64 and Clark County Code. *Supra* at 43-48. Indeed, Clark County provided *greater* procedural protections than RCW 84.64 requires by expressly advising Plaintiffs of the non-refundable nature of the sale, that the lots for sale may not be "buildable," and that due diligence was necessary to ensure that lots were

fit for the Plaintiffs' particular purposes. (CP 146-148). It is undisputed in this case that Plaintiffs specifically acknowledged these extra procedural warnings and the "As Is / Where Is" nature of the sale prior to bidding twenty six times on Lot 27. (143-148). There is no evidence in this case that Clark County was obligated to research Lot 27 on behalf of Plaintiffs or provide them with otherwise publically available documents to facilitate their due diligence. In the absence of such evidence, the trial court correctly granted summary judgment and dismissed Plaintiffs *as applied* procedural due process claims.

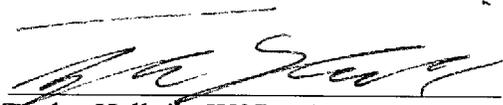
VI. CONCLUSION

The doctrine of *caveat emptor* has correctly been applied by Washington courts to inherently speculative and risky tax foreclosure auctions for more than eighty years. Pursuant to this long-standing doctrine, the undisputed facts of our case demonstrate that Plaintiffs acquired Lot 27 in Clark County's tax foreclosure auction after expressly agreeing to "As Is / Where Is" auction terms and without performing any pre-auction due diligence. Plaintiffs' claims in this case are legally and factually unsupported attempts to circumvent the doctrine of *caveat emptor* and their own failure of due diligence. The trial court correctly applied Washington law to the facts of this case and rejected these

attempts. In particular, the trial court properly rejected Plaintiffs' strained and circulate argument that the Subdivision Act and common law penalize and afford a remedy of rescission in foreclosure sales that are mandated by the Foreclosure Act and which are incapable of rescission. Moreover, the trial court correctly determined that the Plaintiffs' acquisition of Lot 27 for a price of their choosing in a voluntary tax foreclosure auction was not "unduly oppressive" and did not violate their rights to substantive or procedural due process. This Court should *affirm* the trial court's orders *denying* of Plaintiffs' motions for summary judgment and *affirm* the trial court's orders *granting* Defendants cross-motions for summary judgment as to all of Plaintiffs' claims.

Respectfully submitted this 12th day of September, 2016.

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