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Washington State Court of Appeals  
Division I



Docket No. 69105-8-I

**ROBERT MATICHUK,**

**Plaintiff-Appellant,**

**v.**

**WHATCOM COUNTY, et al.,**

**Defendants-Respondents.**

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**APPELLANT'S OPENING BRIEF**

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Bryan D. Lane, WSBA No. 18246  
*Attorney for Plaintiff-Appellant*  
114 W. Magnolia St., Fourth Floor  
Bellingham, WA 98225  
(360) 647-5163

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred in granting summary judgment of dismissal to Whatcom County after concluding that no regulatory taking occurred under the fifth amendment to the U.S. Constitution.

2. The trial court erred in granting summary judgment of dismissal to Whatcom County after concluding that no regulatory taking occurred under article I, section 16 of the Washington Constitution.

### **Issues Pertaining to Assignments of Error**

1. Did the trial court err in concluding that the properties at issue still retained value despite the fact that they were no longer buildable, such that no regulatory taking occurred?

2. Did the trial court err in concluding that plaintiff was no longer the real party in interest when plaintiff subsequently transferred the unbuildable lot to the adjacent owner with a reversionary interest?

## **II. STATEMENT OF THE CASE**

Defendant Whatcom County sought summary judgment in this case based on the facts as alleged in the complaint. In opposition, plaintiff presented the Declaration of Robert Matichuk which confirmed under oath and elaborated upon the facts set forth in the complaint. As contained in that declaration, the facts are as follows:

In July 2005, plaintiff Robert Matichuk purchased six contiguous lots (lots 19 through 24) in Block 3, South Geneva, Whatcom County, Bellingham. [CP 17] In May 2007, Matichuk purchased two additional lots, 17 and 18. [CP 12-13]

All of these lots were undeveloped properties within the Geneva neighborhood just outside Bellingham, on the border of the Urban Growth Area. It was Matichuk's intention to build homes on these undeveloped lots and then resell the developed properties. At the time, many homes were being built in the neighborhood, and Matichuk saw this as a good investment opportunity. [CP13]

At the time of the property purchases, the entire block in which the lots were located was zoned Urban Residential 3 (UR3) under the provisions of the Whatcom County zoning code. When Matichuk purchased the lots, he discussed his plans extensively with Whatcom County officials. Following those discussions, Whatcom County issued a determination letter that Matichuk could develop a total of five single family homes on the six parcels lots 19 through 24, and one home each on lots 17 and 18, for a total of seven homes. [CP13]

Matichuk began property development in 2006. During 2006, he began construction of homes on lots 19 and 20, and sold them in 2007. During 2007, he began construction of homes on lots 21 and 22, and sold

them in 2008, completing four of the five homes permitted in that tract of lots. [CP 13]

On February 13, 2008, Whatcom County enacted Ordinance No. 2008-003, which amended the Whatcom County Comprehensive Plan Map. The Ordinance had the effect of removing the southern half of Block 3, including lots 17 through 24, from the Geneva Urban Growth Area. The Ordinance re-zoned the parcels to Rural 5 acres (R5A). None of the lots are five acres in size, and few if any in the developed Geneva area are five acres in size. [CP 13]

The zoning change was irregular in certain respects. For example, it changed the density for the southern half of Block 3, but not the northern half, in an area that was already largely developed as a residential neighborhood, in a place where utility services were already available. Apparently there is no official documentation for why the south part of the block was included in the new UGA when to do so would make it inconsistent with the northern part. [CP 13-14]

On May 27, 2008, Matichuk applied for a building permit to construct a home on the combined lots 23 and 24. A short time later, on June 3, 2008, he applied for separate building permits to construct single family residences on Lots 17 and 18. With those three homes, Matichuk

would have successfully developed the seven homes he was legally entitled to build. [CP 14]

On July 8, 2008, under the direction of defendant Stalheim, defendant Smith wrote a determination letter denying Matichuk's request for a building permit on Lots 23 and 24. [See CP 18-19 (Matichuk Declaration, Exhibit B)]. The Determination Letter established that lots 23 and 24 had been consolidated into Lot 22 by ordinance, and therefore could not be built upon. *Id.*

That same day, Smith wrote a separate determination letter allowing construction of one home on the combined lots 17 and 18. [See CP 20-21 (Matichuk Declaration, Exhibit C)] The Determination Letter established that lots 17 and 18 had been consolidated by ordinance, and therefore Lot 18 could not be built upon separately. *Id.*

Thus, as the County conceded in its summary judgment motion, when Matichuk purchased the properties, he had the ability – as the County officials had confirmed – to build seven homes. However, the county only approved construction of five homes on those lots. Citing the new ordinance – enacted after Matichuk had purchased the lots -- the County refused to allow completion of development of the Matichuk properties. [CP 14]

In response to the county's actions, Matichuk took two actions. First, he appealed the decisions of the Planning Department to the Whatcom County Hearing Examiner. Simultaneously, in March 2009, he applied for a comprehensive plan amendment. [CP 14] The request for a plan amendment sought to return the lots to their original zoning classification so that the two lots could be built upon. [See Matichuk Declaration, Exhibit D, p. 1] The application was premised on the facts that the zoning change had resulted in an irregular configuration in the neighborhood, and this would again make the north and south parts of the block consistent. Nevertheless, the County Council denied the request for a comprehensive plan amendment. Also, the Hearing Examiner later denied the appeal of the denial of building permits on July 14, 2010. Because the County Council had already denied the request for a comprehensive plan amendment to change the property zoning, an appeal of the Hearing Examiner's decision to the County Council on essentially the same issue would have been a futile gesture. [CP 14]

The end result of the county's actions was that Matichuk could not build on Lots 18, 23 and 24. In fact, those lots no longer existed, as they would be consolidated into other lots that would be sold as the homes were developed. There was no possibility that Matichuk could ever use

them, and their best and only use after the county's decisions was as yard space for the adjoining properties. [CP 14]

On August 3, 2008, Matichuk entered into a purchase and sale agreement with Mr. and Mrs. Bull for the sale of the home developed on Lot 22, the lot adjoining lots 23 and 24. At the time of the transaction, the appeal of the permit denial for Lots 23 and 24 was still pending, and Matichuk had not yet filed the request for a comprehensive plan amendment. He still hoped to ultimately develop a home on the combined lots 23 and 24. [CP 14]

Because Matichuk's ability to use the combined lots 23 and 24 remained uncertain at the time, Matichuk included within the purchase and sale agreement with Bull a provision that Matichuk could reacquire from them the Lots 23 and 24 in the future. [CP 15] The document also confirmed that the property had no value in the sale transaction because it was not buildable. [See Matichuk Declaration, Exhibit E]

Plaintiff filed this action in Skagit County Superior Court on July 7, 2011 for damages due to the regulatory taking that rendered Lots 18, 23 and 24 valueless. [CP 61] On May 14, 2012, Whatcom County moved for summary judgment. On June 18, 2012, Judge David R. Needy granted Whatcom County's motion for summary judgment, and dismissed the case. [CP 55] In his oral decision, the principal reasons for granting the

County's motion were his belief that the application of the county's ordinances did not result in a regulatory taking because they did not render plaintiff's property valueless [RP 5] and that plaintiff lacked standing to pursue his claims. [RP 6]

Matichuk timely appealed on July 16, 2012. [CP 56]

### III. ARGUMENT

Judge David Neely ruled as a matter of law that no taking occurred in this case in violation of plaintiff's rights because plaintiff's property was not rendered "valueless." He also rules as a matter of law that plaintiff lacked standing to pursue his claims against the County. The trial court erred in both these conclusions. All of the evidence of the record shows that, following the county's actions, plaintiff's property had no economic value. All of the evidence also shows that plaintiff is the party that suffered the economic injury in this action, and therefore he is the proper party to pursue the case. At the very least, questions of fact on these issues should have precluded summary judgment. This case should therefore be remanded to Skagit County Superior Court for trial.

#### A. Standards on Summary Judgment.

The standards for entry of summary judgment are well settled. Summary judgment is appropriate only "when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a

matter of law.” Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990); CR 56(c). “A material fact is one upon which the outcome of the litigation depends in whole or in part.” Atherton Condominium Apartment Owners Ass’n v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The court must review the facts in the light most favorable to the nonmoving party, and the motion should be granted only if, from all of the evidence, reasonable persons could reach but one conclusion. Sedwick v. Gwinn, 73 Wn. App. 879, 885, 873 P.2d 258 (1994) quoting Marincovich, 114 Wn.2d at 274.

Based on these standards, the court erred in granting summary judgment. Whatcom County’s actions had the effect of direct deprivation of any economic benefit plaintiff had in his properties, in violation of the federal and Washington Constitutions. At the very least, a question of fact exists about whether a taking occurred.

**B. Whatcom County’s Actions Constitute a Taking In Violation of Matichuk’s Constitutional Rights.**

Defendant Whatcom County sought summary judgment based on the argument that plaintiff received what he was entitled to: he built five homes on the properties he owned, and sold them for value. According to Whatcom County, adoption of the ordinance was “well within the

legitimate exercise of Whatcom County's police powers," and could not be the basis for damages.

The problem with the County's position, which the trial court accepted, was that it started with an inaccurate premise. Plaintiff started his development project not with five lots, but with seven. When the county rezoned his property, he was left with five buildable lots from the seven he owned. The loss of two was a taking in violation of plaintiff's rights under the federal and state constitutions.

The fifth amendment provides that private property shall not be taken for public use, without just compensation. It is made applicable to Washington and all other states through the fourteenth amendment. With regard to takings claims asserted as a result of government regulation, the general rule is that "if a regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 US 393, 415 (1922). As is generally the case, the Court has been searching for exactly when a regulation goes "too far." In this case, the court must decide whether the change to one home per five acres zoning, concomitant with the consolidation of all lots smaller than that, goes "too far." Case law demonstrates that it does.

Governmental land-use regulations that deny the property owner any economically viable use of a property are deemed a taking of that

affected property under the fifth and fourteenth amendments. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (deprivation of all economically beneficial use is, from the perspective of a property owner, deprivation of the property itself); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (destruction of value of property constituted a taking). More recently, in Lingle v. Chevron, 544 U.S. 528 (2005), the Supreme Court held that when a government regulation effects a taking of private property by such excessive regulation, the owner may initiate inverse condemnation proceedings to recover the just compensation for the taking of his or her property. Washington courts have reached similar conclusions under the federal standard. *See, e.g.*, Powers v. Skagit County, 67 Wn. App. 180, 835 P.2d 230 (1992) (property owner entitled to compensation if land use restrictions eliminate all economically viable uses for the property).

Despite these well settled authorities, the trial court ruled *as a matter of law* that on this record plaintiff did not suffer an economic loss. The trial court reached this conclusion even though it is undisputed that the county's actions had the effect of reducing Matichuk's buildable lots from seven to five; lots 18, 23 and 24 could not under any circumstances

be developed. Through ordinance, Matichuk lost all economic benefit to them because they could not be built upon.

The trial court surmised that, even though the lots were rendered unbuildable, they maintained some economic value, and could have been sold to adjacent property owners for value. [RP 5] There are absolutely no facts in the record which would support that conclusion. Indeed, the purchase and sale agreement between Matichuk and the buyer of the home Matichuk developed on the adjoining lot reflects that the unbuildable lot was being transferred for no consideration. It was inappropriate for the trial court to speculate on summary judgment about property value. As the non-moving party on summary judgment, Matichuk was entitled to have all inferences of fact resolved in this favor. The trial court should not have ruled that plaintiff retained value following the rezone without a trial. The case should be remanded to hold that trial.

This conclusion is even more apparent under Article I, Section 16 of the Washington Constitution. That provision provides: “No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner.” The clear language of the provision, with its difference from most other constitutions and early cases, shows that the constitutional framers sought to place a limit on the legislature by assigning the judiciary the duty to

determine the character of proposed public uses. James M. Dolliver, *Condemnation, Credit, and Corporations in Washington: 100 Years of Judicial Decisions -- Have the Framers' Views Been Followed?*, 12 U. Puget Sound L. Rev. 163, 175-76 (1989).

In Housing Communities v. State, 142 Wn.2d 347, 13 P.3d 183 (2000), the Washington Supreme Court ruled that under Article I, Section 16, an ordinance is invalid on its face if it effects a total taking of all economically viable uses of one's property. In that case, the court struck down a Washington statute which granted mobile home park residents the right to first refusal to purchase their landlord's mobile home park in the event it was placed for sale. The court's analysis defined a "total taking of economically viable uses" as denial of its use, as follows:

Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right.

Housing Communities, 142 Wn.2d at 364; Guimont v. Clarke, 121 Wn.2d 586, 854 P.2d 1 (1993) (same); *see also* Ackerman v. Port of Seattle, 55 Wn.2d 400, 409, 348 P.2d 664 (1960).

In our case, Whatcom County's actions had the effect of reducing Matichuk's buildable lots from seven to five. The lots 18, 23 and 24 could not under any circumstances be developed. Through ordinance, Matichuk lost all economic benefit to them because they could not be built upon. This direct deprivation of any economic benefit to those lots is a taking under the Washington Constitution. At the very least, a question of fact exists about whether Matichuk lost all economic benefit to his ownership of them. The case should be remanded to the trial court to hold a trial on that issue.

C. **Matichuk is the Real Party in Interest.**

The trial court also held as a matter of law that Matichuk lacked standing to pursue his claims, as following sale of the properties he was no longer the real party at interest. [RP 6]

The trial court erred on the standing issue for two reasons. First, the argument misses the point: plaintiff's interest in the property had already been invaded at the time the properties were sold. By ordinance and the subsequent actions of the county under its alleged authority, the county deprived plaintiff of his use of the property by preventing future development. Indeed, by automatically consolidating smaller lots, the County also totally divested him of the property itself. It was Matichuk that lost value, not subsequent owners. Matichuk had a stake in the

outcome, and no one else. He therefore is the appropriate plaintiff in this action. *See* CR 17(a) (cases must be prosecuted by real party in interest).

In that way, this case is unlike cases which had conditioned standing upon current ownership. For example, in Magart v. Fierce, 35 Wn. App. 264, 666 P.2d 386 (1983), the court dismissed a quiet title action being brought by someone other than the record owner, because the plaintiff had no stake in the outcome. In that case, present and future rights to the property were germane. Here, the value of the property has already been stripped. The current owners have no interest in the outcome; Matichuk incurred the loss, not the present owners.

Second, ownership was not germane to this suit against the county for damages because plaintiff maintained a reversionary interest in order to prosecute the suit. There is a claw back agreement in place with owners Bull for Lots 23 and 24. Matichuk was prepared to reclaim the properties as necessary to move forward.

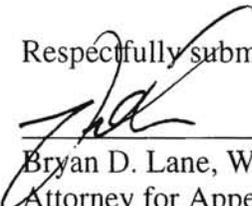
#### **IV. CONCLUSION**

The trial court erred in dismissing plaintiff's claims on summary judgment. Genuine issues of material fact existed on whether plaintiff suffered an economic loss due to the county's actions, such that a taking occurred. Issues of fact also existed on whether plaintiff was the real party

at interest. Accordingly, the court should remand this case to the Skagit  
County Superior Court for trial.

Dated this 21<sup>st</sup> day of June, 2013.

Respectfully submitted,



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Bryan D. Lane, WSBA No. 18246  
Attorney for Appellant