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No. 74528-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JAMES CHUMBLEY, et al.,

Appellants,

v.

Snohomish County, et al.,

Respondents

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**BRIEF OF RESPONDENTS JAKE BEGIS AND BEGIS BUILDING,
INC.**

Bradley S. Wolf, WSBA #21252
Jeff Roberson, WSBA # 45550
Law Offices of Bradley S. Wolf
600 First Avenue, Suite 600
Seattle, Washington 98104
Telephone: (206) 264-4577
Fax: (206) 838-1906
Attorneys for Respondents Jake Begis and
Begis Building, Inc.

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I. INTRODUCTION

This appeal arises from the permitting and construction of a single-family residence in Edmonds, Washington. Jake Begis (“Mr. Begis”) owned the relevant lots and applied for the project permits; Begis Building, Inc. (“Begis Building”) constructed the residence. Snohomish County (“the County”) approved the residence’s building permits and the Snohomish County Health District (“the District”) approved the septic system serving the residence. Kee Bong Kim and Diana Young (“Mr. Kim and Ms. Young”) bought the house from Mr. Begis after the County approved its occupancy.

After the sale of the residence closed, a number of neighboring landowners filed suit against the County, the District, Mr. Begis, Begis Building, and Mr. Kim and Ms. Young, alleging that the septic system serving the residence had been approved without required review and that it amounted to a public and private nuisance. These neighboring landowners included James and Evelyn Chumbley, Irene Artherholt, the Lester G. and Irene Artherholt Revocable Trust, Glenn and Patricia Dalby, Roy Main, Thomas and Madeline Norman, and the Burlington Northern Sante Fe Railway Company, Inc. (collectively “the plaintiffs”). The plaintiffs requested writs of prohibition, review, and mandamus; injunctive and declaratory relief; and relief under the Land Use Petition Act (LUPA).

They sought to stay the effectiveness of all County and District approvals for the residence and septic system, reverse and remand those approvals, enjoin operation of the septic system, and require the County and the District to perform the review the plaintiffs believed necessary.

The trial court dismissed the plaintiffs' requests for equitable relief after determining that LUPA provided an adequate remedy at law. The trial court dismissed the plaintiffs' LUPA petition after determining that the petition amounted to an untimely collateral attack on the building permit approval over which it lacked jurisdiction. Accordingly, the trial court dismissed the County, the District, Mr. Begis, and Begis Building from the suit.

The plaintiffs now appeal the trial court's dismissal of their LUPA petition. This court should reject the plaintiffs' claims on appeal and affirm the trial court's dismissal of Mr. Begis and Begis Building for two reasons.

First, the trial court correctly concluded that the plaintiffs' LUPA petition was untimely. The County approved a building permit for the residence approximately nine months before the plaintiffs filed suit. That building permit approval necessarily included a determination that an approved means of waste disposal, the septic system, served the proposed single-family residence. Any challenge to the adequacy of the review for

that waste disposal system should have been made by way of a LUPA appeal of the building permit approval. The plaintiffs' failure to file such a LUPA appeal deprived the trial court of jurisdiction over the plaintiffs' claim.

Second, regardless of this court's treatment of plaintiffs' LUPA claim, the plaintiffs seek no relief from Mr. Begis or Begis Building. Neither retains any interest in the properties at issue here, and neither is an official of the County or the District. The plaintiffs' failure to seek relief from Mr. Begis and Begis Building renders the claims against them moot and their dismissal from the suit was proper.

II. RESTATEMENT OF ISSUES

1. Did the trial court correctly determine that the plaintiffs' LUPA claim amounted to an untimely collateral attack on the building permit approval, necessitating dismissal of the claim?

2. Did the trial court properly dismiss Begis Building and Begis Building given that the plaintiffs sought no relief from them, making the plaintiffs' claims against them moot?

III. STATEMENT OF FACTS

Pursuant, to RAP 10.1(g)(2), Mr. Begis and Begis Building adopt the County's and the District's statement of facts providing the history of the permitting and development of the single-family residence and septic

system at issue here. Mr. Begis and Begis Building supplement that history with the following additional facts.

After the County approved the occupancy of the single-family residence, Mr. Begis sold it and the three parcels involved in this appeal to Mr. Kim and Ms. Young. *See Clerk's Papers (CP) at 773.* The sale closed on September 25, 2015. *Verbatim Transcript of Proceedings (VTP) (Nov. 20, 2015) at 29.* The plaintiffs filed suit five days later, on September 30, 2015. *See CP at 813-71.*

The County and the District, joined by Mr. Begis and Begis Building, moved to dismiss the plaintiffs' claims for equitable relief and relief under LUPA. *CP at 388-93, 539-58, 613-35.* At the hearing on those motions, counsel for Mr. Begis and Begis Building urged the court to dismiss them from the suit, stating that "[t]here is no relief that has been requested against my clients in this case, except for the fact that it is our permit that is being challenged in this case, and that is why it's appropriate that we be dismissed." *VTP (Nov. 20, 2015) at 66.* When the trial court asked the plaintiffs what relief they were seeking relief from Mr. Begis or Begis Building, plaintiffs' counsel stated "[y]our Honor, the reason that Mr. Begis was named and his company was named is because LUPA requires that the applicant be named in the LUPA petition. It's a statutory requirement." *VTP (Nov. 20, 2015) at 66.*

The trial court granted the motions to dismiss. It determined that “[t]he question of the validity or adequacy of the approval of the Onsite Sewage System by [the District] is integrally related to the County’s decision whether to grant a building permit,” and that the plaintiffs therefore needed to file a LUPA petition seeking review of the building permit approval. CP at 81-82. Given that the plaintiffs had not done so within the period prescribed by LUPA, the trial court concluded that their petition was untimely. CP at 81-82. Because LUPA would have provided for an adequate remedy at law if the plaintiffs had timely filed a petition, the trial court denied their requests for equitable relief. Accordingly, the trial court dismissed the County and the District from the suit. As the plaintiffs “acknowledge[d] they [were] seeking no form of relief” from Mr. Begis and Begis Building “except for the LUPA claims,” the trial court concluded that “dismissal of the LUPA claim dismisses the sole jurisdictional basis for joinder.” Consequently, the trial court also dismissed Mr. Begis, and Begis Building from the suit. CP at 83.

The trial court entered final judgment on all claims against the County, the District, Mr. Begis, and Begis Building pursuant to CR 54(b), CP at 83, and denied the plaintiffs’ motion for reconsideration. CP at 23-24, 64-73. This appeal followed.

IV. ARGUMENT

The trial court dismissed the plaintiffs' claims against Mr. Begis and Begis Building on a CR 12(b)(6) motion. This court reviews such dismissals de novo and will affirm the dismissal where "the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Trujillo v. Nw Tr. Servs.*, 183 Wn.2d 820, 355 P.3d 1100 (2015).

This court should affirm the trial court's dismissal of Mr. Begis and Begis Building, for two reasons. First, the trial court correctly concluded that the plaintiffs failed to timely file their LUPA petition, depriving the courts of jurisdiction to review the land use decisions at issue. Second, the plaintiffs seek no relief from Mr. Begis or Begis Building, rendering the claims against those two defendants moot.

A. This court should affirm the dismissal of Mr. Begis and Begis Building because the plaintiffs' LUPA petition was time barred.

The County and the District explain why the plaintiffs' failure to petition for review under LUPA within 21 days of the approval of the building permits for the single-family residence bars judicial review of the plaintiffs' claims. Pursuant to RAP 10.1(g)(2), Mr. Begis and Begis Building adopt those arguments by reference and urge this court to affirm the dismissal of the plaintiffs' LUPA petition.

B. This court should affirm the dismissal of Mr. Begis and Begis Building because plaintiffs' claims against them are moot.

Even if this court were to determine that the trial court erroneously concluded that the plaintiffs' claims were time-barred, it should still affirm the dismissal of Mr. Begis and Begis Building because the plaintiffs' claims against them are moot.

Prompted by Mr. Begis and Begis Building's counsel's request for dismissal, the trial court specifically asked plaintiffs' counsel what relief the plaintiffs sought from those two defendants. Plaintiffs' counsel conceded that they sought none by stating that the plaintiffs had named Mr. Begis and Begis Building as defendants only because LUPA defined them as necessary parties. *See* RCW 36.70C.040(2)(b)(i). That concession binds the plaintiffs in this court as they have not argued, let alone shown, that it resulted from fraud or attorney overreach. *Nguyen v. Sacred Heart Hosp.*, 97 Wn. App. 728, 987 P.2d 634 (1999) (citing CR 2A and RCW 2.44.010).

Even if this court were to disregard plaintiffs' concession, the record shows that they seek no relief from Mr. Begis or Begis Building. Mr. Begis sold the property at issue here to Mr. Kim and Ms. Young before the plaintiffs commenced suit, and he no longer has any interest in the residence, the properties, or the permit approvals. Neither Mr. Begis

nor Begis Building serve as officers of the County or the District. Mr. Begis and Begis Building are therefore irrelevant to the relief sought by the plaintiffs.

Plaintiffs' failure to request relief from Mr. Begis and Begis Building renders the claims against those defendants moot. A case or issue is moot when “the court cannot provide the basic relief originally sought or can no longer provide effective relief.” *Josephinium Assocs. v. Kahli*, 111 Wn. App. 617, 622, 45 P.3d 627, 630 (2002) (quoting *Snohomish County v. State*, 69 Wn. App. 655, 660, 850 P.2d 546 (1993)); accord *Brown v. Vail*, 169 Wn.2d 318, 337-39, 237 P.3d 263 (2010). The court cannot grant meaningful relief from Mr. Begis or Begis Building when the plaintiffs could not, and did not, seek any.

Given the mootness of plaintiffs' claims, this court can and should affirm the dismissal of Mr. Begis and Begis Building. Courts may affirm a dismissal on mootness grounds, even where the trial court otherwise erroneously dismisses a case. *Orwick v. City of Seattle*, 103 Wn.2d 249, 252-53, 692 P.2d 793 (1984). Such an affirmance permits courts to “avoid the danger of an erroneous decision caused by the failure of the parties, who no longer have an existing interest in the outcome of a case, to zealously advocate their position.” *Id.* at 253. Consequently, even if the court determines that the trial court erred by dismissing the LUPA

petition, it should affirm the trial court's dismissal of Mr. Begis and Begis Building on mootness grounds.

This court will occasionally review a moot case when the case “presents a matter of ‘continuing and substantial public interest,’” *State v. Beaver*, 184 Wn. App. 235, 241, 336 P.3d 654 (2014), or is capable of repetition but evading review. *In re Recall Charges Against Seattle Sch. Dist. No. 1*, 162 Wn.2d 265, 173 P.3d 265 (2007). Neither of those exceptions apply here.

The continuing and substantial public interest exception applies only where a case becomes moot after a hearing on the merits. “In those cases, the facts and legal issues ha[ve] been fully litigated by parties with a stake in the outcome of a live controversy” and it would waste judicial resources to “dismiss an appeal on an issue of public importance which is likely to recur in the future.” *Orwick*, 103 Wn.2d at 253. The claims against Mr. Begis and Begis Building were dismissed before any hearing on the merits. Accordingly, “[d]ismissal of the[] claim[s] will not involve a waste of judicial resources and will avoid the danger of allowing” Mr. Begis and Begis Building “to litigate . . . claim[s] in which they no longer have an existing interest.” *Id.* at 253-54.

The “capable of repetition yet evading review” exception only applies where there is “‘a reasonable expectation’ or a demonstrated

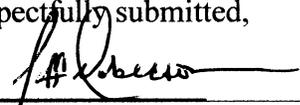
probability that the same controversy will recur involving the same complaining party.” *Hart v. Dep’t of Soc. & Health Servs.*, 111 Wn.2d 445, 452, 759 P.2d 1206 (1988). A “mere physical or theoretical possibility” does not suffice to allow use of the exception. *Id.* Plaintiffs cannot show a reasonable expectation or demonstrated probability that a dispute over the placement of a sewer system in the hillside near their homes would recur. Nor can they show that such a controversy would easily evade review: a timely LUPA petition would have allowed review of the permits approved involved in this appeal and would allow for review of any future permits.

V. CONCLUSION

Mr. Begis and Begis Building respectfully request that this court affirm their dismissal from this suit because (1) the plaintiffs’ LUPA petition was time-barred and (2) the claims against them are moot.

Dated this 8th of April, 2016.

Respectfully submitted,

By 

Leonard Jeffrey Roberson, WSBA #45550
Bradley Wolf, WSBA #21252
The Law Offices of Bradley S. Wolf
Attorneys for Respondents Jake Begis and
Begis Building, Inc.

Certificate of Service

I, Jeff Roberson, certify that I am over 18 years of age and not a party to this action. I am an attorney for defendants Jake Begis and Begis Building, Inc.

I certify that on April 11, 2016, I filed the original and one true and correct copy of the Brief of Respondents Jake Begis and Begis Building, Inc. with the Court of Appeals of the State of Washington, Division One, and served copies of the brief electronically upon the following:

<p>Michael Chait Bradley P. Scarp Montgomery Scarp, PLLC 1218 Third Avenue, Suite 2500 Seattle, WA 98101 Attorneys for BNSF Railways Company, Inc. mike@montgomeryscarp.com brad@montgomeryscarp.com</p> <p>Dale N. Johnson Duncan M. Greene Van Ness Feldman, LLP 719 Second Avenue, Suite 1150 Seattle, WA 98104 Attorneys for James and Evelyn Chumbley, Irene Artherholt, The Lester G. and Irene Artherholt Revocable Trust, Glenn and Patricia Dalby, and Roy Main dnj@vnf.com; dmg@vnf.com</p>	<p>Eric C. Nelson Sayre Law Offices, PLLC 1320 University Street Seattle, WA 98101 Attorney for Kee Bong Kim & Diana Young eric@sayrelawoffices.com</p> <p>Steve Uberti Shipman Uberti, P.S. 3631 Colby Avenue Everett, WA 98201 Attorney for the Snohomish County Health District suberti@shipmanuberti.com</p> <p>Brian Dorsey Civil Division 8th Floor M/S 504 3000 Rockefeller Avenue Everett, WA 98201-0460 Attorney for respondent Snohomish County Brian.dorsey@snoco.org</p>
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I declare under the penalty of the laws of the State of Washington that the foregoing information is true and correct.

DATED this 11th day of April, 2016, at Seattle, Washington.



Leonard Jeffrey Roberson
WSBA # 45550
Attorney for defendants Jake
Begis and Begis Building,
Inc.