No. 82326-0

SANDERS, J. (dissenting)—I disagree with the majority on a fundamental level. The disagreement can be simply put: the majority views the test in *Arnold v. Melani*[1] as a balance of equities. It is not.

It is incorrect to view *Arnold*, 75 Wn.2d 143, solely as a balance of equities because the *Arnold* test is, first and foremost, a gatekeeper. It is a checklist of five requirements wherein *each* must be satisfied by clear and convincing evidence before a trial court can grant the "exceptional relief" of refusing to enforce a private citizen's property rights for the benefit of another private citizen. Only one requirement of the test incorporates a balance of equities, tilted in favor of the lawful landowner: the court must determine whether the encroacher has shown, by clear and convincing evidence, that "there is an *enormous* disparity in resulting hardships." *Id.* at 152 (emphasis added). The other four requirements are completely independent of any balance of equities or even any comparison between the encroacher and the landowner. *Id.* The first addresses characteristics of the encroacher; the second and third

[1] 75 Wn.2d 143, 449 P.2d 800, 450 P.2d 815 (1968).

address effects on the lawful landowner; and the fourth considers whether it is practical to move the encroachment. *Id.*

Arnold permits a court to refuse to enforce a lawful property owner's private property rights—"exceptional relief for the exceptional case"—*only* when its five requirements are met. *Id.* The majority views *Arnold* as if it were a flood of equity, and thereby drowns the protection of property rights in the process. The *Arnold* court was mindful of equity, but *Arnold* is not an all-access equity pass. It formulates a *narrow exception* to the *rule* that property rights are enforced. *Arnold*'s first allegiance is to "the protection of the concept of private property" as a "'sacred' right [that] exists in a free society." *Id.*

The *Arnold* court was not bashful in its protection of private property rights. An encroacher must prove *each* of the five requirements by clear and convincing evidence:

> (1) The encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure; (2) the damage to the landowner was slight and the benefit of removal equally small; (3) there was ample remaining room for a structure suitable for the area and no real limitation on the property's future use; (4) it is impractical to move the structure as built; and (5) there is an enormous disparity in resulting hardships.

Id.

Here, Robert and Christine Huntington did not, and cannot, prove the second and third requirements by clear and convincing evidence. The trial court

erred by refusing to enforce Proctor's property rights.

Second *Arnold* requirement

The Huntingtons failed to prove the second requirement by clear and convincing evidence: "the damage to the landowner was slight and the benefit of removal equally small." *Id.* Whether we turn to case law or common sense, Proctor lost an entire acre of land. The loss of one acre—43,560 square feet—is not "slight," nor would the benefit of its return be equally small.

Previous decisions measured "slight" losses in inches or a few feet—not 43,560 square feet. *See Arnold*, 75 Wn.2d at 145 (an encroachment of 10 feet); *Hanson v. Estell*, 100 Wn. App. 281, 288-89, 997 P.2d 426 (2000) (a barn encroached upon one foot of property); *Holmes Harbor Water Co. v. Page*, 8 Wn. App. 600, 601-02, 508 P.2d 628 (1973) (a house exceeded the maximum height under a restrictive covenant by 4 inches to 2.6 feet); *cf. Adamec v. McCray*, 63 Wn.2d 217, 219-20, 386 P.2d 427 (1963) (rejecting a balance of equities but noting that cases where the doctrine is applied deal with encroachments of "a few inches").

And that conforms to both common sense and the English language. "Slight" is "small of its kind or in amount: scanty, meager" and "something (as an amount, quantity, or matter) that is slight or insignificant." Webster's Third New International Dictionary 2142 (2002). A court might reasonably pronounce

that the loss of a few inches or feet of property is insignificant. The landowner will suffer no more than slight damage from being unable to tread upon, build upon, or otherwise enjoy a few extra inches of land. Furthermore, the landowner is unlikely to benefit from return of a few inches or feet of property; the return will not affect how the landowner uses his or her land or what the landowner does on his or her property.

But an acre could provide the site for an entire homestead, as it did here. And Proctor need not develop the property to suffer its loss or benefit from its return. Whereas the damage is slight if Proctor couldn't build, hike, hunt, or bird watch on a few additional inches of property, the loss of an entire acre of property is readily noticeable. Furthermore, the acre in question here is an elevated piece of property with a commanding view of the surrounding area – a view to which Proctor no longer has access.

Because neither the loss of one acre nor the benefit from regaining it is "slight," the trial court lacked the legal authority to take Proctor's land for the Huntingtons' benefit. The resolution of this case under *Arnold* is, or rather should have been, as simple as that.

The majority makes various attempts to circumvent this rather obvious observation. None of its attempts is consistent with *Arnold* nor do they pay any respect to the substantial protections the law previously afforded private property

rights. The majority erroneously melts the second requirement, permitting only slight damage to the landowner, with the fifth requirement, which balances equities. It holds Proctor's loss is slight and the corresponding benefit from return of the acre equally slight *compared to the Huntingtons' loss if they are forced to vacate Proctor's acre of land.* Majority at 14.

But determining whether the Huntingtons' loss is "enormous" compared to Proctor's loss is the *fifth* requirement of the *Arnold* test. *See* 75 Wn.2d at 152. The majority renders the second requirement redundant, fashioning it into a second balance of equities. It emphatically is not. The second requirement makes *no reference whatsoever* to equity or the losses of the encroacher. The second requirement is purely a question of the landowner's loss and must be proved individually by clear and convincing evidence. *See id.*

This requirement is a fundamental check on the danger posed by permitting courts to refuse to enforce property rights. Refusing to enforce a landowner's property rights when he or she stood to suffer the loss of only a few inches or feet of property is *still* an erosion of those rights, but a *slight* erosion permitted to avoid gross inequity. Refusing to enforce a landowner's right to an entire acre of land is not mere erosion; it is a judicial taking of property for private benefit. *Arnold* understood this slippery slope and protected against it; the majority's rewriting, and effective overruling, of *Arnold* slides right down

that slope.

The majority then attempts to sidestep the second half of the second *Arnold* requirement, asserting Proctor would gain only slight benefit from having his acre returned because one acre would not "appreciably increase the value or size" of his remaining 29-acre parcel. Majority at 14. I confess I do not entirely understand this argument. "Appreciable" means "[c]apable of being measured or perceived." Black's Law Dictionary 117 (9th ed. 2009). Returning one acre to Proctor would increase the size of his parcel by over three percent and its value by at least $25,000. Is that appreciable? Yes, by definition. Is it "slight"? We should all be so lucky for the return of $25,000 worth of property to be only a slight benefit. But if that is the majority's rationale, that Proctor has enough land or money already and thus $25,000 is slight *to him*, I find no legal support in *Arnold* or our case law generally to label a landowner's loss "slight" because he or she is rich. The majority's attempt to "Robin Hood" Proctor because he owns another 29 acres is outside the law.[2]

Perhaps the majority is unconcerned with Proctor's loss of an entire acre because he is being paid $25,000 for it – the court-determined fair market value. But that is not a valid consideration under *Arnold.* The court *always* requires the

[2] Nor is this taking in the true spirit of Robin Hood, who robbed from the rich to give to the poor. Proctor, the former owner of 30 acres, is losing an acre to the Huntingtons, who already own 27 acres.

encroacher to compensate the lawful landowner for his or her lost property if that property is not returned under *Arnold*. If that compensation balances out the property loss and renders the loss or benefit from regaining the property slight, the entire second *Arnold* requirement will always be satisfied and is therefore pointless.

The majority's approach is also inconsistent with the nature of private property. A fundamental aspect of private property is the landowner's right to choose if he or she will sell the property and, if so, for how much. The majority cannot simply stroll through Sherwood Forest, redistribute property, and say any harm is slight if the victims are paid what the court determines is fair market value. If Proctor really valued his property only at the market value, he would have sold it already.

Moreover, money is not the real issue here. Land is unique, impossible to duplicate, and unable to be ubiquitously substituted for money. *Crafts v. Pitts*, 161 Wn.2d 16, 25-26, 162 P.3d 382 (2007). Proctor owns *that* specific one acre of property and, with it, the right not to sell it for $25,000 or any amount. A landowner is permitted to value his or her land independently of monetary compensation. If the majority insists on ignoring the market value of Proctor's loss when considering whether it is slight under *Arnold*, it should at least consider Proctor's loss of the value *he* places on the land.

The nonmonetary value Proctor places on his property is evident in the record. Proctor purchased his land as a quiet, secluded living environment. With the Huntingtons' home on that specific acre of Proctor's property, they are close enough to Proctor's home that he hears their dogs barking, children making noise, and the traffic to and from their home.[3] In the majority's one-sided balance of equities, it discusses the Huntingtons' losses at length, but makes no attempt to consider the full extent of Proctor's losses. Perhaps the majority should consider the obvious: if Proctor truly does not value this one acre—if the benefit of its return would be only "slight"—why would he bother to file a lawsuit and then appeal the issue all the way to the Washington Supreme Court to

[3] I find no merit blaming Proctor for the loss of his seclusion because he built his home after the Huntingtons built theirs. First, Proctor chose a building site on his property as he found it. Had he known immediately the Huntingtons built their home on his property, or even built their home without having an official survey conducted first, he may have investigated further and initiated this action prior to building his home and may have even reclaimed that flat, elevated acre of property for his own home. Second, the Huntingtons must prove that Proctor would not receive even slight benefit from having his land returned. *See Arnold*, 75 Wn.2d at 152. Since moving the Huntingtons off Proctor's one acre would lessen, if not entirely remove, the noise, the Huntingtons cannot make such a showing by clear and convincing evidence.

Whether Proctor could have built his house somewhere else on his remaining 29 acres of land is immaterial. But even if it weren't, the record provides that, due to the nature of the terrain (forest, hills, and marsh areas), some if not most of the area is not suitable to build a house. Neither trial court findings nor evidence in the record demonstrates Proctor's property contained any other housing sites comparable to the one he chose; there is no basis now to infer that Proctor has other comparable alternatives.

get that one acre back?

Regardless of whether the majority views Proctor's loss as the objective or subjective value of the encroached property, that loss isn't slight and the benefit of its return is not equally slight. *See Arnold*, 75 Wn.2d at 152. The Huntingtons did not, and cannot, satisfy the second requirement – that Proctor's loss and the benefit from the acre's return is slight. *Arnold* does not permit the court to take Proctor's one acre of land.

Peoples Savings Bank v. Bufford[4]

What other wrecking ball can the majority find to smash through the barriers *Arnold* established to protect private property rights in Washington? The majority digs up a relic of a case from 1916, addressed briefly in *Arnold*, 75 Wn.2d at 150, 152. *See* majority at 12. But *Peoples Savings Bank v. Bufford*, the feeble champion and sole justification of the majority's position that an entire acre of land can be "slight" under *Arnold*, cannot bear the weight of the majority's desperate wishes. *See* 90 Wash. at 208-09.

There, Bufford bought one city lot in a row of identical lots in Seattle, but built his house on the wrong lot by mistake. *Id.* at 204-05. Peoples Savings Bank owned the lot upon which he built his house and offered to resolve the matter by swapping the bank's deed for that property for Bufford's deed to a vacant, but

[4] 90 Wash. 204, 208-09, 155 P. 1068 (1916).

otherwise identical, lot. *Id.* at 208. Bufford refused, instead hoping to keep the lot to which he already held title and to obtain the bank's lot for free by adverse possession. *See id.* at 206-08. That didn't work. *See id.* The court resolved the matter by letting the bank have its proposed deed swap. *Id.* at 209.

Now let us be perfectly clear on this. *Bufford* is a six-page opinion from 1916, almost entirely about adverse possession, that devotes only one paragraph to a vague discussion of "equitable relief." Here it is:

> Both parties have asked for equitable relief. Each of them have asked that their title be quieted in lot five in block ten. At the beginning of the trial, appellant [Peoples Savings Bank] offered to make a deed to respondents [Bufford] for lot five in block ten in consideration of a deed to lot five in block seven. The first maxim in equity is: *He who seeks equity must do equity*. Considering that each party was acting in entire good faith, and each party has paid taxes upon their record titles during all these years ; and that no claim was made to both lots by respondents until after the ten-year period after the first possession had run, we think it would be inequitable to permit appellant to oust respondents, or to permit respondents to refuse to either deed lot five in block seven or to reimburse appellant for the taxes it has paid upon the lot upon which they have erected their home. Equity will not give respondents more than they could have claimed at law if the mistake had been discovered in time to bring an action of ejectment.

Bufford, 90 Wash. at 208-09.

Bufford is a decision with thin analysis, issued nearly 100 years ago, stemming from very unique facts. It is not, to say the least, the paradigmatic case for the majority to expand and rewrite *Arnold.* The *Arnold* court itself cited *Bufford* for the proposition that considerations of equity and good faith mistakes

were appropriate when determining whether a trespasser must be removed from the landowner's property. *Arnold*, 75 Wn.2d at 150 (citing *Bufford*, 90 Wash. at 209). *Arnold* then reasoned that *Bufford*, among other cases, "*support*[*s*] the premise that a mandatory injunction can be withheld as oppressive when . . . it appears (and we particularly stress), that [the five *Arnold* requirements are satisfied: (1) encroacher acted in good faith, (2) slight damage to landowner, (3) no real limit on landowner's future use of remaining property, (4) impractical to move encroachment, and (5) the balance of equities enormously favors encroacher]." *Id.* at 152 (emphasis added).

One could read this "support" passage to mean *the principles expressed* in *Bufford* support the *Arnold* analysis. And that is certainly the case. In its brief analysis, *Bufford* mentions both good faith and equity as grounds upon which it forgoes ejecting Bufford from the Peoples Savings Bank's lot. 90 Wash. at 208. *Arnold* adopts those as its first and fifth requirements. *See Arnold*, 75 Wn.2d at 152. Thus, *Bufford* lends doctrinal *support* to *Arnold*. *See id.* This interpretation of "support" is untroubled by the fact that *Bufford* did not raise, address, or accept the other three requirements set forth in *Arnold*.

But the majority reads the statement in *Arnold*, that *Bufford* "supports" the standard set forth, to mean that if applied, the facts in *Bufford* would satisfy the five *Arnold* factors: particularly relevant here is that the landowner suffered only

"slight" damage and would receive "slight" benefit upon return of the encroached property. The majority then concludes that because *Bufford* involved an *entire* parcel of property, instead of an entire acre of a 30-acre property, the amount of lost property that can constitute "slight" damage to the landowner under the second *Arnold* requirement is up to and including the landowner's entire property. Majority at 12.

There are two problems with this extrapolation from *Bufford*. *Bufford* didn't apply all five of the *Arnold* factors. It is irresponsible for the majority to attempt to add meat to the decayed bones of *Bufford*; the *Bufford* court did not consider three of the factors nor did it develop an evidentiary record for us to do so now.

But if the majority insists playing Dr. Frankenstein, a resurrected *Bufford* does not support the majority's claim that *Arnold* permits a trial court to take Proctor's acre of property. The facts of *Bufford* are easily distinguishable. The *Bufford* court's focus was whether it was equitable for the bank to give up its lot *in exchange for an essentially identical lot*. 90 Wash. at 208-09. The damage to the bank was "slight" and the benefit of the return of its original lot equally "slight" because the bank would receive one of two essentially identical lots regardless of the outcome. *See Arnold*, 75 Wn.2d at 152. Here, Proctor is not receiving essentially identical land in exchange, but rather the court-determined

market value of his property. The difference (and ensuing damage and benefit) is not "slight" and the "remedy" forced on Proctor ignores the uniqueness of land and the inability to substitute it uniformly for money. *See Crafts*, 161 Wn.2d at 25-26.

Furthermore, in *Bufford* the bank suggested the exchange at the beginning of the trial. 90 Wash. at 208. Where the bank expressed that it would accept the deed swap, and assuming the obvious—that the bank would not volunteer to damage itself or sustain unnecessary losses—the *Bufford* court could have reasonably assumed the bank viewed its own damage as "slight." Again, Proctor emphatically states and discusses why his losses are not "slight." Ultimately, *Bufford* was driven by its unique facts and does not justify the majority's expansion of *Arnold.*

Third *Arnold* requirement

The Huntingtons also fail to prove the third *Arnold* requirement by clear and convincing evidence: "there was ample remaining room for a structure suitable for the area and no real limitation on the property's future use." *Arnold*, 75 Wn.2d at 152. Failure to prove any *Arnold* requirement precludes the trial court from refusing to enforce Proctor's property rights. *Id.*

The majority might[5] argue Proctor's remaining 29 acres still permit him to

[5] The majority all but ignores the third requirement, referencing it only to attempt to justify its misguided Robin Hood theory under the second requirement. *See*

build a house and thus there is "ample remaining room for a structure suitable for the area." *However*, further consideration highlights the *Arnold* test was not fashioned to address encroachments over a few inches or feet—i.e., those failing the second requirement. The acreage in that area—both that of Proctors and the Huntingtons—is heavily forested, hilly, and contains some marshland. There are a limited number of areas on which are flat enough to reasonably build a house. Yes, Proctor was able to build his home on a portion of his remaining 29 acres. However, the Huntingtons' one acre encroachment prevented him from building anything on the elevated lookout upon which the Huntingtons' house is located. It also put a "real limitation" on the future use of his property because he is prevented from enjoying a *unique*, one-acre piece of his property—whether he ultimately decided to build on that elevated patch of land, or he chose instead to use it for hiking, camping, bird-watching, hunting, or just quiet meditation.

The third requirement makes sense when we address minor encroachments; Proctor would not have any real limitations on using his property if he lost a few feet of that elevated land. His inability to hike, camp, or build part of a structure on those few feet would be of little consequence. It would be no real limitation if, for example, Proctor's hike to that boundary of his property was cut eight inches short.

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majority at 14 n.9.

But now that the majority has stretched permissible encroachments to an entire acre, the third requirement just doesn't fit. It is a "real limitation" on the future use of property if the encroachment occupies a piece of property so large that Proctor loses the potential site for an entire homestead—in an area where not all property is fit for building a home. And the limitations are not simply on development. Proctor is unable to hike an additional acre of his property to enjoy the lookout that acre affords. He is unable to camp there, hunt there, or use the entire acre of land for any other activity he might enjoy.

The third requirement is awkward to apply here because the loss of an entire acre of land should have already been weeded out by the second *Arnold* requirement. In any event a similar analysis under the second requirement makes it equally obvious that Proctor has a real limitation placed upon his property's future use when he loses an entire acre of land suitable for development or to be enjoyed in its natural state.

Conclusion

Arnold wrote a *narrow* exception to Washington's historically ironclad protection of private property rights. *Arnold* was never a grant of unbridled equity; it was not created as some sort of supercharged judicial eminent domain where courts can transfer property rights from one private citizen to another based upon the court's determination of which party wants or needs it more. A

court's authority to judicially take private property from the lawful landowner for the benefit of an encroacher severely erodes the concept of private property rights—and the *Arnold* court knew it. The bar for an encroacher to obtain land through equity is therefore high: the encroacher must prove, by clear and convincing evidence, each of the five *Arnold* requirements. An encroacher demonstrating he or she will suffer an enormous hardship if ejected speaks to only *one* of those requirements.

Or, so it was. The majority extends the balance of equities to all the *Arnold* requirements; this misreading of *Arnold* is tantamount to overruling it. And I do not envy the trial courts that will have to apply the majority opinion—the "new *Arnold*." Whereas *Arnold* provided five clear, independent requirements, the majority has chopped up those requirements and boiled them together into an indistinguishable equity-sludge—and, to mix metaphors, has knocked down wall upon wall of private property protections in the process.

The moral of this story should be: before you build, *especially* near a property line, get a survey.

Because the majority effectively overrules *Arnold*, dissolving *Arnold*'s strong protection of private property rights, I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR:
Chief Justice Barbara A. Madsen

Justice Gerry L. Alexander

Justice James M. Johnson