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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

No. 35171-4-II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOHN BICHLER and MARIANNE SOUTHWORTH,

Appellants,

v.

COWLITZ COUNTY, and RYDERWOOD
IMPROVEMENT AND SERVICES ASSOCIATION, INC.,

Respondents.

BRIEF OF RESPONDENT
RYDERWOOD IMPROVEMENT AND SERVICES ASSOCIATION, INC.

By FRANK F. RANDOLPH
Attorney for Respondent RYDERWOOD
IMPROVEMENT AND SERVICES ASSOCIATION,
INC.

WSB #32572
WALSTEAD MERTSCHING PS
1000 Twelfth Avenue, Suite Two
Post Office Box 1549
Longview, WA 98632-7934
Telephone: (360) 423-5220
Fax: (360) 423-1478

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOHN BICHLER and MARIANNE SOUTHWORTH,

Appellants,

v.

COWLITZ COUNTY, and RYDERWOOD
IMPROVEMENT AND SERVICES ASSOCIATION, INC.,

Respondents.

I. STATEMENT OF ISSUES

A. Whether this Court should affirm the trial court ruling that Mr. Goro was a person “identified by name and address in the local jurisdiction’s written decision as an owner of the property at issue” in accordance with RCW 36.70C.040(2)(b)(ii) and therefore had to be joined in the LUPA petition?

B. Whether this Court should now consider Bichler’s objection to RISA’s jurisdictional challenge when Bichler failed to object at trial and RISA never waived the challenge?

C. Whether this Court should now consider Bichler’s objection to Goro’s status as a taxpayer when Bichler failed to object at trial?

II. STATEMENT OF THE CASE

A. BICHLER VIOLATES ZONING ORDINANCE, BEGINNING 2001-2002

On May 23, 2001, Appellants Bichler and Southworth (hereafter “Bichler”), as buyers, entered into a real estate contract with Gabriel Goro (hereafter “Goro”), as seller. The land was located in the vicinity of Ryderwood, Cowlitz County, Washington, and is hereafter referred to as “Tract 13.” The purchase price was \$40,000. Bichler paid \$15,000 down and agreed to pay Goro the remaining \$25,000 at the rate of \$300 per month, with the entire amount due no later than April 30, 2007. Upon fulfillment of the contract, Goro agreed to deliver to Bichler a Statutory Warranty Deed. CP 113-114, paragraphs 1, 2, 4(a), 4(c), and (8).

Tract 13 was at all relevant times, and is, zoned as “Forestry Recreation,” which permits individual recreational activities such as hiking, horseback riding, picnicking, hunting, etc. Other uses, if compatible with the character of the area, may be permitted through special use procedures. CP 126, paragraph 8.

In 2001-2002, without first seeking the required special use permits, Bichler began to develop Tract 13 as a private RV campground for his family

and friends. He laid out a total of 14 RV spaces, plus added two cabanas. In addition, he set up a shooting/target area on the tract. CP 124-125, paragraphs 4b, 5.

B. DENIAL OF SPECIAL USE PERMIT/ORDER OF ABATEMENT

After being informed by Cowlitz County that the RV campground violated the zoning code, Bichler applied for a special use permit. CP 124, paragraph 1.

In July of 2005, Bichler's application was heard by Irv Berteig, the Cowlitz County Hearing Examiner. Berteig noted that the private RV campground only benefitted a limited number of people. However, if the special use were approved, it would adversely impact the surrounding senior community in Ryderwood, and create a precedent for further changes to the detriment of the community. On August 22, 2005, the Hearing Examiner denied Bichler's application and ordered the abatement of the continuing violation. CP 138, Section V, paragraphs 19 and 20, and Section VI.

Decision Identified Goro By Name and Address. In his written decision, Mr. Berteig found that:

According to Cowlitz County Assessor records, the property owner is Gabriel D. Goro. John Bichler and Marianne Southworth are the contract purchasers.

(Emphasis added.) CP 127, paragraph 15. This finding identified Mr. Goro by name as the owner of the subject property. In addition, the real estate contract between Bichler and Goro was Exhibit 31 of the Hearing Examiner's Findings, Conclusions and Decision; and the real estate contract provided two addresses for Goro: c/o Cowlitz County Title Company, 1159 14th Avenue, Longview, WA 98632 (where Bichler sent his monthly payments) and CP 114, paragraph 4(c), and 12218 1st Avenue S., Seattle, WA 98168 (the designated address for any notices required under the contract). Therefore, the written decision of the local jurisdiction identified, by name and address, the owner of the subject property. CP 114, paragraph 4(c); 116, paragraph 25; 123, lines 2-3.

C. BICHLER APPEALS TO SUPERIOR COURT

1. Bichler Failed To Challenge Finding of Goro's Ownership. And Failed to Serve Goro. Bichler filed his Land Use Petition on September 9, 2005, naming Cowlitz County as a respondent, but failed to serve Goro as the owner of the property at issue. CP 1. Furthermore, in his petition, he failed to challenge the Hearing Examiner's finding as to ownership of Tract 13. CP 4-11.

///

2. Cowlitz County Failed to Challenge Jurisdiction. On October 17, 2005, Bichler and Cowlitz County entered into a Stipulation and Order Pursuant to RCW 36.70C.080(5). At that time, Cowlitz County waived the defenses enumerated in RCW 36.70C.080(3). However, Ryderwood Improvement and Service Association, Inc., (hereafter “RISA”) was neither aware of this stipulation nor a party to the action at this time. CP 38-41.

3. RISA Intervened and Challenged Jurisdiction. RISA is a nonprofit corporation which owns property and provides services to its members in Ryderwood, Washington, and its vicinity. Its members constitute a 55 years and older residential community. CP 42, 47-51, 52-57.

RISA became aware of Bichler’s LUPA petition and in early December of 2005 filed a motion to intervene. CP 42-92, 45.

On December 14, 2005, Bichler, Cowlitz County and RISA entered into a Stipulated and Agreed Order Granting Leave to RISA to Intervene as a Respondent. CP 247-250.

After being granted permission to intervene, RISA next appeared before the trial court on January 10, 2006, when it filed its Reply Brief in the LUPA action. At that time, RISA raised the issue of Bichler’s failure to comply with RCW 36.70C.040(2)(b)(ii), by failing to mail a copy of his petition to Goro,

a person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue. CP 173-193; 183-184.

4. Bichler Fails to Object to Jurisdictional Challenge Prior to Court's Decision. In his Petitioner's Rebuttal, dated January 25, 2006, Bichler ignored RISA's challenge to jurisdiction. CP 196-199.

On February 10, 2006, the trial court, Judge James J. Stonier presiding, heard Bichler's petition. RISA again challenged the court's jurisdiction due to Bichler's failure to comply with RCW 36.70C.040(2)(b)(ii). Bichler again ignored the issue and failed to object to RISA's jurisdictional challenge. CP 222, paragraph II H.

On March 29, 2006, Judge Stonier ruled that the court lacked jurisdiction to hear the appeal, as the record did not disclose any effort by Bichler to provide Goro notice either in person, by mail or by publication. Judge Stonier found that the Hearing Examiner's written record identified Goro as the "deed holder" and did contain information regarding his address. In addition, in what appears to be an alternate basis for his decision, Judge Stonier found that Goro was the "taxpayer" for the property in question.¹

¹ The record does reflect that the Cowlitz County Assessor did indeed list Goro as the owner of Tract 13 for tax purposes, but lists Bichler's address as Goro's mailing address. CP 58.

Judge Stonier then listed RCW 36.70C.040(2)(a) and (c) as the authority for his decision. Paragraph (c) is the correct reference for the requirement that the taxpayer must be notified, but paragraph (a) appears to be a typographical error. Paragraph (a) applies to notification to the local jurisdiction (i.e., Cowlitz County), which is not in dispute. Paragraph (b) is the provision which requires notification to the owner. CP 251-252.

5. Bichler Completes Real Estate Contract, Argues “Goro No Longer Party of Interest” and Objects to Jurisdictional Challenge. On April 21, 2006, Bichler recorded a Statutory Warranty Deed, which then conveyed Tract 13 from Goro to Bichler and Southworth. CP 220.

On May 5, 2006, the trial court entered its formal Order Dismissing Land Use Petition. CP 253-255.

On May 15, 2006, Bichler filed a Motion for Reconsideration. In this motion, he argued for the first time that RISA had waived the jurisdictional defense in the October 2005 stipulation between himself and Cowlitz County (prior to RISA’s entry in the action two months later). Interestingly, in this motion, he conceded that Goro was the taxpayer of record (a position he now challenges as error for the first time on appeal). CP 205-220; see 207, lines 3-4, for his concession of Goro’s status as taxpayer of record.

On June 15, 2006, the trial court denied Bichler's Motion for Reconsideration, again stating that service upon persons identified as owners is a jurisdictional requirement of a LUPA petition. CP 256-257.

On July 7, 2006, the trial court entered the formal Order Denying Motion for Reconsideration. CP 227-228.

On July 31, 2006, Bichler filed his Notice of Appeal to the Court of Appeals.

III. ARGUMENT

A. FAILURE TO INCLUDE OWNER AS A PARTY BARRED LAND USE PETITION

1. Goro was the person "identified by name and address in the local jurisdiction's written decision as an owner of the property at issue" in accordance with RCW 36.70C.040(2)(b)(ii), and Bichler failed to challenge finding. In his decision, the Hearing Examiner, Mr. Berteig, made the specific finding that "the property owner is Gabriel D. Goro." In addition, the written decision included two addresses for Mr. Goro, both of which were known by Bichler (including the address to which he sent his monthly payments from June of 2001 until April of 2006).

RCW 36.70C.070 states that:

A land use petition must set forth . . .

(7) A separate and concise statement of each error alleged to have been committed;

...

In his petition, Bichler failed to challenge Mr. Berteig's finding that Goro was the property owner, thus it became a verity on appeal. *United Dev. Corp. v. Mill Creek*, 106 Wn. App. 681, 688, 26 P.3d 943 (2001). There is no evidence in the record that Goro was ever informed of the controversy concerning the land, even though the controversy existed for over four years prior to Bichler completing the contract and acquiring legal title.

Furthermore, when RISA challenged the trial court's jurisdiction, Bichler failed to object. Bichler did not object in his rebuttal brief, filed on January 30, 2006, nor did he object at the hearing held on February 10, 2006. Accordingly, he is barred from raising it for the first time in his Motion for Reconsideration. CR 59(a)(9) provides that a party can seek a motion for reconsideration or new trial for an:

error in law occurring at the trial and objected to at the time by the party making the application

(Emphasis added.) Long established case law supports the rule that a party cannot move for reconsideration based on a purported error of law to which

they did not object at trial. *State v. McKenzie*, 56 Wn.2d 897, 901, 355 P.2d 834 (1960); *Clemans v. Western*, 39 Wash. 290, 81 Pac. 824 (1905). The reason for this rule is that if a party does not object, the trial court is not given an opportunity to correct the error when made. Furthermore, if the rule is not enforced, it invites a losing party to search the trial record for reasons to appeal.

Furthermore, even in his Motion for Reconsideration of May 11, 2006, Bichler failed to raise the argument--which he now makes on appeal-- that by law Goro was not "an owner" of real property. What he actually argued was that Bichler was:

truly the real parties in interest with respect to this parcel of property. In fact, Petitioners have recently paid the Real Estate contract in full and are now the taxpayers of record with regard to the property at issue. . . . Gabriel Goro no longer has any interest in the property and never was an interested party in this LUPA appeal.

(Emphasis added.) CP 207. Here, Bichler is not arguing that Goro was not the owner of the property at the time of the Hearing Examiner's decision or at the time Bichler filed his appeal. What Bichler appears to be arguing, three months after the hearing, is that by fulfilling the real estate contract in April of 2006 (two months after the hearing), he somehow divested Goro of his right to notice in September of 2005. However, LUPA's requirement that

the owner of record be mailed a copy of the petition--to the address listed in the decision--is clear. There is no provision in the statute for a court to determine "the true party of interest." In fact, if no owner is so identified in the decision, RCW 36.70C.040(2)(c) provides that the petitioner must at least notify:

each person identified by name and address as a taxpayer for the property at issue in the records of the county assessor, based upon the description of the property in the application

At the time of the LUPA petition, Goro was listed as the taxpayer for the property at issue in the records of the county assessor. While the county's records listed Bichler's address as Goro's address as taxpayer, there is no dispute that Bichler was aware of Goro's address, as he continued to forward monthly payments to Goro until April of 2006. The consequences of failing to make any effort to notify the owner of record or the taxpayer of record are clear: the land use petition is barred. RCW 36.70C.040(2).

Since Bichler failed to challenge the findings below--by both the Hearing Examiner and the trial court--that Goro was the owner of the property, he cannot now raise it on appeal for the first time. RAP 2.5(a) provides that:

The appellate court may refuse to review any claim of error which was not raised in the trial court.

The appeals court “will not review an issue, theory, argument, or claim of error not presented at the trial court level.” *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001). As of January 10, 2006, Bichler had notice that RISA challenged the jurisdiction of the trial court. Yet he failed--both in his rebuttal brief of January 30 and at the hearing on February 10--to address or to object to this fundamental challenge by RISA.

2. Trial court correctly ruled that the owner must be a party. Even apart from Bichler’s numerous procedural errors, the trial court made the correct substantive decision in holding that RCW 36.70C.040(2)(b)(ii) required that Goro be notified of the LUPA petition. In his appeal brief, Bichler argues that:

When an owner of real property enters into an executory contract for the sale of land and the purchaser enters into possession, the interest retained by the seller is personal property and the seller’s right is to payment under the contract.

Appellant’s Brief, page 6. This concept is known as the doctrine of “equitable conversion.” *Cascade Sec. Bank v. Butler*, 88 Wn.2d 777, 782, 567 P.2d 631 (1977). However, Respondent respectfully submits that this doctrine has been rejected by the Washington Supreme Court:

We are urged to embrace the doctrine of equitable conversion as the proper characterization of the respective interests of the

vendor and vendee [in a real estate contract]. That is a theory by which the vendee's interest is at once converted into real property and the vendor's interest is strictly personal property. It is premised upon the maxim that equity regards that as done which ought to be done. 2 S. Spencer, *Pomeroy's Equity Jurisprudence* §§ 370-372, at 31-33 (5th ed. 1941). To adopt that doctrine would merely substitute a new set of uncertainty for the confusion which has followed *Ashford*.

(Emphasis added) *Id.*

What the trial court decided and what the appeals court is being asked to decide--if the procedural objections are overcome--is whether, as a matter of law, a real estate contract vendor cannot be an “owner of disputed property” in the context of RCW 36.70C. All of the cases cited by Bichler on the issue of defining the vendor-vendee rights are decisions within the context of specific statutes, and do not address the issue within the context of a LUPA appeal. *Committee of Protesting Citizens, Thorndyke Area v. Val Vue Sewer Dist.*, 14 Wn. App. 838, 545 P.2d 42 (1976) (vendor’s interest in the context of RCW 56.20.030, protest of formation of local improvement district); *Meltzer v. Wendell-West*, 7 Wn. App. 90, 497 P.2d 1348 (1972) (vendor-vendee rights in the context of RCW 26.16.030, community property); *Cascade Sec. Bank v. Butler*, 88 Wn.2d 777, 567 P.2d 631 (1977) (vendor-vendee rights in the context of RCW 4.56.190, judgment lien); *Freeborn v. Seattle Trust & Sav. Bank*, 94 Wn.2d 336, 617 P.2d 424 (1980) (vendor-

vendee's rights in the context of RCW 62A.9-102(3) and RCW 65.08.070, security rights); *Bays v. Haven*, 55 Wn. App. 324, 777 P.2d 562 (1989) (vendor-vendee's rights in the context of the creation of an implied easement); and *Chelan County v. Wilson*, 49 Wn. App. 628, 744 P.2d 1106 (1987) (vendor-vendee's rights in the context of county's subdivision zoning ordinance). As stated in *Cascade Sec. Bank*, supra,

It is apparent from our many cases cited above that we have defined and classified the interest of vendors and vendees for a variety of purposes. That body of case law is based upon a realistic examination of the nature of the interest in a particular context.

(Emphasis added.) *Id.* 88 Wn.2d at 784.

RCW 36.70C.040(2)(b)(ii) is clear:

(2) A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on the following persons who shall be parties to the review of the land use petition:

...

(b) Each of the following persons if the person is not the petitioner:

...

(ii) Each person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue;

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(Emphasis added.) The legislative directive is unequivocal and a land use petition is barred if timely service is not completed in accordance with RCW 36.70C.040(2). See *Overhulse Neighborhood Ass'n v. Thurston County*, 94 Wn. App. 593, 598, 972 P.2d 470 (1999). As a person identified in the Hearing Examiner's decision, Goro was required to be named as a party and served pursuant to RCW 36.70C.040(2)(b). Bichler's failure to do this deprived the court of jurisdiction over this matter. The trial court did not err in dismissing the LUPA claim.

Furthermore, compliance with this requirement is not difficult. The Hearing Examiner's decision listed Goro as the owner of the property and the record included two addresses for him (one of which was the address to which Bichler sent his monthly payments for the real estate contract from May 2001 until April of 2006). In the LUPA context, while service on the local jurisdiction must be by delivery to the persons identified by or pursuant to RCW 4.28.080, service on other parties is much simpler:

(5) Service on other parties must be in accordance with the superior court rules or by first class mail to:

...

(a) The address stated in the written decision of the local jurisdiction for each person made a party under subsection (2)(b) of this section;

...

(6) Service by mail is effective on the date of mailing and proof of service shall be by affidavit or declaration under penalty of perjury.

(Emphasis added.) RCW 36.70C.040(5)-(6). To rule, as a matter of law, that a real estate vendor cannot be a owner in the context of LUPA and therefore the vendee has no obligation to mail a copy of the petition to the vendor's last known address would seem to undermine the clear intent of the statute to the contrary. By the wording of the statute, a petitioner must make some effort to notify either (1) the owner listed in the decision of the local jurisdiction or (2) the taxpayer listed in the county's records. Bichler failed to do either, but instead attempted to determine unilaterally that Goro had no interest in the proceeding.

B. RISA NEVER WAIVED THE DEFENSE OF FAILURE TO JOIN THE OWNER AND RAISED THE ISSUE AT THE FIRST OPPORTUNITY.

As discussed above, Bichler failed to object to RISA's jurisdictional challenge prior to the trial court's decision. The first time he raised the issue was in his motion for reconsideration. Accordingly, pursuant to CR 59(a)(7) and RAP 2.5(a), as discussed above, this issue is not properly before this court.

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Furthermore, the trial court did not grant permission for RISA to join the action until December 14, 2005, which was two months after the stipulation was entered on October 17, 2005, by Bichler and Cowlitz County. RISA never waived the defense. In its very first subsequent appearance or argument before the court, its Reply Brief of January 10, 2006, RISA challenged the trial court's jurisdiction.

Bichler erroneously relies on RCW 36.70C.080(3) to support his argument. This statute indicates that the defenses of improper service and failure to join a necessary party are waived if not raised at the initial hearing. However, when read in conjunction with sections (1) and (2), waiver clearly applies only to named parties who fail to raise the issues. RCW 36.70C.080(1) (after serving all parties, the petitioner must note an initial hearing); RCW 36.70C.080(2) (the parties shall note all motions on jurisdictional and procedural issues for resolution at the initial hearing). RISA could not have waived the defense at the time the stipulated order was entered on October 17, because at that time RISA was not a party, and RCW 36.70C.080(3) only applies to parties at the initial hearing.

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C. BICHLER CANNOT RAISE THE ISSUE OF GORO'S STATUS AS A TAXPAYER FOR THE FIRST TIME ON APPEAL

Bichler failed to raise this issue in the trial court below, and thus is barred by RAP 2.5 from raising it on appeal now.

Interestingly, in his Land Use Petition, Bichler concedes that the “written decision of the Hearing Examiner identified Gabriel D. Goro as the taxpayer of record.” CP 2, paragraph 1.4. Furthermore, the record shows that as of November 30, 2005, Goro was in fact listed by the Cowlitz County Assessor as the taxpayer of record. CP 106. It would appear that the trial court found, in the alternative, that Goro was also entitled to notice as the taxpayer of record. CP 251-252.

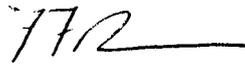
IV. CONCLUSION

Bichler failed to properly challenge the Cowlitz County Hearing Examiner's finding that Goro was the owner of the disputed property and failed to serve Goro with the LUPA petition. RISA did not waive this defense and properly challenged the trial court's jurisdiction at its first opportunity. Bichler failed to respond to this jurisdictional challenge prior to the trial court's decision. Since Bichler did not raise below the issues (1) of waiver, (2) of Goro's status as owner and (3) of Goro's status as taxpayer of record,

he cannot now raise them on appeal. Even if he could, the trial court properly ruled that Goro, as the undisputed owner and taxpayer of record, had to be mailed a copy of the petition. Accordingly, the trial court's ruling should be affirmed.

DATED: December 8, 2006.

Respectfully submitted,



FRANK F. RANDOLPH, WSB #32572
Of Attorneys for Respondent RISA

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CERTIFICATE

I certify that on this day I caused a copy of the foregoing Brief of Respondent RISA to be mailed, postage prepaid, addressed as follows:

Attorney for Appellants:

Jeffrey P. Helsdon
Sloan Bobrick Oldfield &
Helsdon PS
7610 - 40th Street W
PO Box 65590
University Place, WA 98464-1590

Attorney for Respondent

Cowlitz County:
Ronald S. Marshall
Cowlitz County Prosecuting
Attorney's Office
Hall of Justice
312 S First W
Kelso, WA 98626

DATED this 11th day of December 2006 at Longview, Washington.



FRANK F. RANDOLPH