

No. 38941-0
IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON
DIVISION II
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CITY OF TACOMA,

Plaintiff/Respondent,

and

JOHNNIE E. LOVELACE, LOIS S. COOPER, and JAMES V. LYONS
and RENEE D. LYONS,

Intervenor-Plaintiffs/Appellants,

v.

NORTHSHORE INVESTORS, LLC, NORTH SHORE GOLF
ASSOCIATES, INC., and HERITAGE SAVINGS BANK,

Defendants/Respondents.

RESPONDENTS NORTHSHORE INVESTORS, LLC and NORTH
SHORE GOLF ASSOCIATES, INC.'S AUTHORIZED SURREPLY

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I. INRODUCTION¹

Intervenors concede that they do not have “traditional” standing to raise their first assignment of error regarding the City’s property interest. Intervenors instead ask the Court to confer “taxpayer” standing upon them. But taxpayer standing is only appropriate when a taxpayer sues a governmental entity, having first unsuccessfully requested that the Attorney General take action. Such is not the case here. Intervenors’ single standing theory fails. This Court should dismiss Intervenors’ appeal regarding the City’s property interest.

The City did not appeal the property interest ruling. It filed no notice of appeal or cross-appeal. Because the City did not appeal, and because the Intervenors do not have standing to raise the issue, the issue of the City’s property interest is not properly before this Court. To the extent the Court considers the City’s arguments for reversal set forth in the City’s response brief, it should affirm the trial court.

II. ARGUMENT

A. Intervenors Do Not Have Standing

1. Intervenors Do Not Have Taxpayer Standing

Intervenors concede that they do not have “traditional standing” to challenge the trial court’s ruling regarding the City’s purported property

¹ Respondents North Shore Golf Associates, Inc. (“NSGA”) and Northshore Investors, LLC (“Investors”) submit this surreply pursuant to Commissioner Schmidt’s notation rulings dated January 4, 2010 and January 13, 2010.

interest in the Golf Course. Intervenors' Reply Brief at 13. Intervenors contend that, instead, they have taxpayer standing. *Id.* Intervenors assert that, "in appropriate circumstances," members of the public are accorded standing by virtue of their status as taxpayers. *Id.* Intervenors do not explain what those "appropriate circumstances" are, stating merely that taxpayer standing is "related to the protection of the public interest." *Id.*

The circumstances are not appropriate here. Taxpayer standing is conferred only in cases where the plaintiff seeks to challenge the legality of governmental acts. As our Supreme Court has explained:

[T]his court has in some cases recognized standing to challenge governmental acts based solely upon the litigant's status as a taxpayer. The recognition of taxpayer standing has been given freely in the interest of providing a judicial forum for citizens to contest the legality of official acts of their government. Under this circumstance a taxpayer must first request action by the Attorney General and that request must be refused before action is begun by the taxpayer.

Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 281, 937 P.2d 1082 (1997) (emphasis added) (citations omitted). Every case cited by Intervenors to support their taxpayer standing theory involved a plaintiff suing a governmental entity. *See State v. Whatcom County Superior Court*, 103 Wn.2d 610, 611–12, 694 P.2d 27 (1985) (suit to enjoin county officials from assigning prisoners to work release programs requiring religious activities); *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 267–68, 534 P.2d 114 (1975) (suit to prohibit state treasurer from disbursing funds

to help public works contractors pay petroleum costs); *Fransen v. Board of Natural Resources*, 66 Wn.2d 672, 673, 404 P.2d 432 (1965) (suit to enjoin sale of state forest lands to City of Tacoma). Intervenors' failure to cite a case conferring taxpayer standing on a private citizen to sue another private citizen is not surprising, as no such case exists.

Moreover, as the court stated in *Greater Harbor 2000*, a condition precedent to taxpayer standing is for the taxpayer first to have requested action by the attorney general and for the attorney general to have declined the request. *See also Whatcom County*, 103 Wn.2d at 614. While it admittedly would have been nonsensical for Intervenors to request action by the attorney general in this case, the fact that they did not do this is fatal to any claim of taxpayer standing.

This Court should not even consider whether Intervenors have taxpayer standing. "An issue raised and argued for the first time in a reply brief is too late to warrant consideration." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). It was incumbent on Intervenors to support their standing to appeal this issue in their opening brief. They failed to do so.

2. Intervenors Correctly Admit That They Lack "Traditional Standing"

In response to NSGA and Investors' Motion for Partial Dismissal, Intervenors abandoned the taxpayer standing argument and reverted to the argument that they have "traditional" standing under the Uniform

Declaratory Judgment Act (“UDJA”). Because Intervenor’s conceded their lack of “traditional” standing in their reply brief, the Court should not consider Intervenor’s most recent standing arguments. In any event, as set forth in NSGA and Investors’ reply in support of their Motion for Partial Dismissal, Intervenor’s arguments are meritless. Standing under the UDJA still requires a showing of “traditional” standing. The right to bring an action under the UDJA “is clarified by the common law doctrine of standing, which prohibits a litigant from raising another’s legal right.” *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (emphasis added). Intervenor’s are not asserting that they have a real property interest in the Golf Course; they are asserting that the City does. In other words, they are “raising another’s legal right.”

B. The City’s Arguments Are Meritless

1. The City Failed To Appeal the Trial Court’s Ruling

The Court should not consider the City’s arguments that the trial court erred in ruling that it does not have a property interest in the Golf Course. The City is a respondent in this appeal. As it admits, “the City did not appeal from the superior court judgment.” Brief of Respondent City of Tacoma at 5. The City nevertheless dedicates its entire brief to arguing why the trial court erred, and asking the Court to grant it affirmative relief by reversing the trial court’s summary judgment ruling.

“It is axiomatic that a party must file a notice of appeal when he or she is asking an upper tribunal to review the ruling of a lower tribunal or, in alternative terms, when he or she is asking the upper level tribunal to exercise appellate jurisdiction.” *Chaney v. Fetterly*, 100 Wn. App. 140, 151, 995 P.2d 1284 (2000). *See also* RAP 5.1(a); RAP 2.4(a). If a party does not do so, the Court has no jurisdiction to review the lower court’s ruling. *Mackey v. Champlin*, 68 Wn.2d 398, 399, 413 P.2d 340 (1966).

Likewise, if a respondent in an appeal wants the appellate court to review any aspect of the lower court’s ruling, it must file a notice of cross-appeal under RAP 5.1. *See Bostwick v. Ballard Marine, Inc.*, 127 Wn. App. 762, 774, 112 P.3d 571 (2005) (stating that “one seeks ‘cross review’ by filing a ‘notice of cross appeal.’”) As with an initial notice of appeal, the Court has no jurisdiction to consider any affirmative relief sought by a respondent who has not filed and served a notice of cross-appeal. *See De Blasio v. Town of Kittitas*, 57 Wn.2d 208, 213, 356 P.2d 606 (1960)

A notice of cross-appeal is critical if a respondent wants the Court to grant any affirmative relief: “Under RAP 5.1(d), a notice of cross-appeal is essential if a respondent seeks affirmative relief as distinguished from urging additional grounds for affirmance.” *Wolstein v. Yorkshire Ins. Co.*, 97 Wn. App. 201, 206, 985 P.2d 400 (1999) (citing *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 700 n.3, 915 P.2d 1146 (1996); 3 Lewis H. Orland and Karl B. Tegland, Wash. Prac. 48 (5th ed. 1998)). Here, the

City seeks only affirmative relief. The City is not urging additional grounds for affirmance; it is seeking reversal of the trial court's ruling without having filed a notice of appeal. The Court has no jurisdiction to consider any of the City's arguments.

The City contends that the issue is before this Court by virtue of Intervenor's appeal and, thus, that the Court should also consider the City's arguments. But as discussed above, the Court is without jurisdiction to consider Intervenor's arguments due to their lack of standing. The only party that ever had standing to raise the issue was the City. The City made a strategic decision not to appeal. Consequently, the Court does not have jurisdiction to consider the issue.

2. The City Does Not Have a Property Interest in the Golf Course by Virtue of the OSTA

Even if the Court elects to consider the City's arguments on the property interest issue, they are meritless. Open space taxation agreements are governed by RCW Ch. 84.34, which enables property owners to receive tax relief for agreeing to maintain their land as open space for a certain period of time. *See* RCW 84.34.010. The statute allows property owners to unilaterally withdraw their property from open space designation. *See* RCW 84.34.070. The only penalty for doing so is the payment of back taxes, penalties, and interest. *See* RCW 84.34.100. An open space taxation agreement is not a "contract" and can be abrogated by the state legislature at any time. *See* RCW 84.34.070.

The purpose of the OSTA was to temporarily restrict the Golf Course to open space in exchange for a reduction in NSGA's property taxes. Nothing in the OSTA even begins to suggest that its purpose was to convey a property interest to the City. While it is true that "no particular words are necessary to constitute a grant" of a property interest, there must at least be some words "which clearly show the intention" to convey a property interest. *Zunino v. Rajewski*, 140 Wn. App. 215, 222, 165 P.3d 57 (2007). The OSTA does not contain any words evidencing an intent to convey an interest in real property — such as "convey," "grant," "assign," "transfer," "deed," "sell," or "quitclaim," or anything similar.

In Zunino the court held that the documents at issue did not convey an easement because they "lack[ed] the required statement of intent to transfer property." *Id.* at 222. The court reached this conclusion even though the relevant documents were entitled "easements" and otherwise complied with the statute of frauds. As the court stated: "These documents failed to convey an easement because the words do not demonstrate a present intent to grant or reserve an easement." *Id.*

The OSTA similarly does not evidence an intent to convey a property interest. Extrinsic evidence establishes that the grantors had no such intent. NSGA's principals believed that the purpose of the OSTA was simply to get a reduction in property taxes in exchange for devoting the Golf Course to open space use. CP 1457. Indeed, NSGA's corporate

minutes dated February 20th, 1980, indicate that NSGA's officers believed at the time that the open space classification under the OSTA was binding only for a maximum of ten years. CP 1856. "[P]articular attention is given to the intent of the grantor when discerning the meaning of the entire document." *Zunino*, 140 Wn. App. at 222. Here, the only evidence of intent in the record before the Court shows that NSGA did not intend to grant a property interest in the Golf Course to the City.

Any doubt whether an instrument conveys a property interest or restricts the use of property must be resolved in favor of the free use of land: "Restrictions, being in derogation of the common-law right to use land for all lawful purposes, will not be extended by implication to include any use not clearly expressed. Doubts must be resolved in favor of the free use of land." *Burton v. Douglas County*, 65 Wn.2d 619, 622, 399 P.2d 68 (1965).²

Further, the Legislature expressly limited the City's ability to go beyond the terms of the open space designation statute by explicitly stating that open space taxation agreements are not contracts and can be abrogated by the Legislature at any time. RCW 84.34.070. This is utterly at odds with the proposition that the OSTA was a privately enforceable instrument intended to convey a property interest.

² (While this rule no longer applies with respect to successors in interest, it still applies with equal force to the original contracting parties).

The City argues that because RCW 84.34.200 allows the City to “acquire” by purchase, lease, etc., various property interests, and because RCW 84.34.037 allows the City to require a property owner to submit to certain requirements as a condition to an open space designation, the City was able to exact a property interest as a condition of granting the open space designation. In essence, the City argues that it may “acquire” any property interest — no matter how broad or onerous — by requiring the property owner to grant that property interest as a condition of current use open space approval. The argument has no merit.

Conditions imposed upon approval of a land use action must be reasonably related to the impacts of the proposed action. *Burton v. Clark County*, 91 Wn. App. 505, 520–28, 958 P.2d 343 (1998). If they are not reasonably related, they are impermissible and an unconstitutional taking of property. *Id.* See also RCW 82.02.020. It is nonsensical to suggest that granting an open space classification — *i.e.*, creating public open space — causes a public problem that can only be mitigated by requiring the transfer of a property interest to the City. On the contrary, the open space statute rewards property owners for keeping their property in open space for some period of time. Moreover, while RCW 84.34.200 allows a governmental entity to “acquire” a property interest by purchase, lease, etc., it expressly states that acquisition by eminent domain is

impermissible. Thus, an acquisition against the owner's will is forbidden. But that is exactly what the City argues it did in this case.

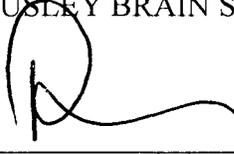
Finally, if the statute is read as broadly as the City suggests, RCW 84.34.200 *et seq.* would be rendered meaningless, because there would never be any need for the City to acquire real property interests under that statute. The City always could require such exactions as a "condition" of an open space request. "The court must interpret statutes to give effect to all language used, rendering no portion meaningless or superfluous." *State Owned Forests v. Sutherland*, 124 Wn. App. 400, 410, 101 P.3d 880 (2004) (citing *City of Seattle v. Dep't of Labor & Indus.*, 136 Wn.2d 693, 698, 965 P.2d 619 (1998)).

III. CONCLUSION

No party perfected the appeal of that portion of the trial court's order ruling that the City has no property interest in the Golf Course. Intervenor necessarily could not perfect that appeal. They have no standing, are not the real party in interest, and are not aggrieved by the trial court's decision. They do not have taxpayer standing. The City elected not to appeal. The Court should disregard both the Intervenor's and the City's arguments that the City acquired a property interest in the Golf Course. To the extent the Court considers the arguments, it should uphold the ruling of the trial court.

DATED this 25th day of January, 2010.

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CERTIFICATE OF SERVICE

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I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 25th day of January, 2010, at Seattle, Washington.