

FILED
COURT OF APPEALS
DIVISION II

11 JAN -4 PM 12:06

NO. 40601-2-II

STATE OF WASHINGTON
BY _____
DEPUTY

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON DEPARTMENT OF REVENUE,

Appellant,

v.

NORD NORTHWEST CORPORATION,

Respondent.

REPLY BRIEF OF APPELLANT

ROBERT M. MCKENNA
Attorney General

Charles Zalesky, WSBA No. 37777
Assistant Attorney General
Revenue Division
P.O. Box 40123
Olympia, WA 98504-0123
(360) 753-5528

ORIGINAL

1-2-11 11/1

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT2

 A. Because Nord Northwest Corporation Did Not Own The Real Property At Issue, The Decision Of The Board Of Tax Appeals Was Incorrect As A Matter Of Law.2

 1. The attributes of ownership do not apply where, as here, there is no dispute as to who owned the real property.....3

 2. Even if the attributes of ownership were applicable, there is no substantial evidence to support the Board of Tax Appeals’ finding that capital contributions by the minority LLC members were actually loans to Nord Northwest Corporation.....4

 3. Evidence tending to show that Nord Northwest Corporation was in control of the two construction projects is not relevant and does not provide an alterative basis for upholding the Board of Tax Appeals.8

 4. The Department’s “Construction Tax Guide” does not control over the plain language of the statute, and does not support Nord Northwest Corporation’s claim that it was a speculative builder.....10

 5. There is no “double taxation” in this case.14

 B. The Board Erred In Finding That Nord Northwest Corporation Held The Beneficial Ownership Of The Real Property Under The Resulting Trust Doctrine.....15

C. Even If A Resulting Trust Had Been Created, Nord
Northwest Corporation Would Still Have Been
Performing Retail Construction Services Upon Real
Property Of A “Consumer.”19

III. CONCLUSION20

TABLE OF AUTHORITIES

Cases

<i>Bank of Am. v. Prestance Corp.</i> , 160 Wn.2d 560, 160 P.3d 17 (2007).....	4
<i>Bird-Johnson Corp. v. Dana Corp.</i> , 119 Wn.2d 423, 833 P.2d 375 (1992).....	10
<i>Drury the Tailor v. Jenner</i> , 12 Wn.2d 508, 122 P.2d 493 (1942).....	15
<i>Gossett v. Farmers Ins. Co. of Wash.</i> , 133 Wn.2d 954, 948 P.2d 1264 (1997).....	4
<i>In re Estate of Spandoni</i> , 71 Wn.2d 820, 430 P.2d 965 (1967).....	16
<i>Manning v. Mount St. Michael’s Seminary</i> , 78 Wn.2d 542, 477 P.2d 635 (1970).....	16
<i>Rigby v. State</i> , 49 Wn.2d 707, 306 P.2d 216 (1957).....	1
<i>Thompson v. Hunstad</i> , 53 Wn.2d 87, 330 P.2d 1007 (1958).....	17, 18, 19

Statutes

RCW 25.15.070(2)(c)	13
RCW 34.05.570(1)(a)	2
RCW 34.05.570(3)(d)	20
RCW 34.05.570(3)(e)	8
RCW 64.04.030	11
RCW 64.04.050	12

RCW 82.04.050(2)(b)	1, 10, 19
RCW 82.04.190(4).....	1, 19, 20
RCW 82.45	14
RCW 82.45.060	14

Regulations

WAC 458-20-170(2)(a)	passim
----------------------------	--------

Treatises

76 Am. Jur. 2d <i>Trusts</i> § 157 (2005).....	16
Restatement (Second) of Trusts (1959)	16, 20

Other Authorities

General Order 2010-1	2
----------------------------	---

I. INTRODUCTION

Construction services are taxable as a retail sale when performed upon real property owned, leased, or possessed by another by a person engaged in business. RCW 82.04.050(2)(b); RCW 82.04.190(4). A person performing retail construction services is commonly referred to as a prime contractor. Conversely, a person performing construction activities on real property it owns is not engaged in an activity meeting the definition of a retail sale and is not required to pay retailing B&O tax, or collect and remit retail sales tax, on the value of its construction activities. *Rigby v. State*, 49 Wn.2d 707, 306 P.2d 216 (1957). A person performing construction activities on real property it owns is commonly referred to as a speculative builder. The tax advantage afforded a speculative builder can be significant.

In the present case, the Washington Board of Tax Appeals misapplied the law when it concluded that Nord Northwest Corporation was a speculative builder with respect to its construction of condominiums on real property owned by affiliated limited liability companies. By concluding that Nord Northwest Corporation was a speculative builder even though it did not own the real property upon which the condominiums were constructed, the Board of Tax Appeals has expanded the speculative builder tax classification far beyond what the law allows.

Although the superior court reversed the Board of Tax Appeals' final decision, the burden of demonstrating the invalidity of the Board's decision remains with the Department of Revenue in this appeal. RCW 34.05.570(1)(a). *See also* General Order 2010-1. For the reasons set forth in the Department's opening brief and in this reply, this Court should reverse the decision of the Board of Tax Appeals and affirm the judgment of the superior court.

II. ARGUMENT

A. **Because Nord Northwest Corporation Did Not Own The Real Property At Issue, The Decision Of The Board Of Tax Appeals Was Incorrect As A Matter Of Law.**

Nord Northwest Corporation argues that the final decision of the Washington Board of Tax Appeals should be upheld because, according to Nord, "there is no question that Nord Northwest Corporation exercised all attributes of ownership as it relates to both properties." Brief of Resp. at 7. In presenting this argument, Nord Northwest Corporation does not suggest that it held fee simple ownership of the real property. Rather, Nord Northwest argues that it should be treated as the beneficial owner of the real property because it "exercised" the four non-exclusive "attributes of ownership" set out in WAC 458-20-170(2)(a). Nord Northwest is incorrect.

1. The attributes of ownership do not apply where, as here, there is no dispute as to who owned the real property.

WAC 458-20-170(2)(a) (hereinafter “Rule 170(2)(a)”) provides:

(a) As used herein the term “speculative builder” means one who constructs buildings for sale or rental upon real estate owned by him. The attributes of ownership of real estate for purposes of this rule include but are not limited to the following: (i) The intentions of the parties in the transaction under which the land was acquired; (ii) the person who paid for the land; (iii) the person who paid for improvements to the land; (iv) the manner in which all parties, including financiers, dealt with the land. . . .

The first sentence of Rule 170(2)(a) defines a “speculative builder” as “one who constructs buildings for sale or rental upon real estate *owned by him.*” (Emphasis added). The second sentence lists four nonexclusive “attributes of ownership.” When read as a whole, and in context with the rest of Rule 170, it is evident that ownership of the real property by the person performing the construction is necessary. The “attributes of ownership” do not establish an exception to the ownership requirement. Rather, they simply set out non-exclusive factors the Department of Revenue will consider when ownership of real property is disputed. *See* Brief of App. at 23-25.

Where, as here, it is evident that the contractor did not own the real property during construction, the “attributes of ownership” do not apply.

Nord Northwest Corporation was not the owner of the real property at issue, and Rule 170(2)(a) does not change that fact.

2. Even if the attributes of ownership were applicable, there is no substantial evidence to support the Board of Tax Appeals' finding that capital contributions by the minority LLC members were actually loans to Nord Northwest Corporation.

Under Washington law, a transfer of title to real property does not always establish ownership of that property. *See Bank of Am. v. Prestance Corp.*, 160 Wn.2d 560, 562 n.1, 160 P.3d 17 (2007). If property is transferred “with the intent to create a debtor-creditor relationship, then the deed may be declared to create an equitable mortgage.” *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 966, 948 P.2d 1264 (1997). For that reason, when a construction contractor takes title to real property prior to starting construction, it is important to look beyond the face of the deed to determine whether the contractor is the bona fide owner of the real property. *See* AR 569.¹

¹ AR 569 is a copy of former Department of Revenue Excise Tax Bulletin (ETB) 275.08.170. That ETB asks then answers the following questions: “Where a landowner deeds a lot to a contractor who builds a house on the lot and then reconveys the land to the original owner, does the Sales Tax apply to the contract price of the house?” In answering the question, the ETB first notes that “[d]eeds, though absolute on their face, may be mortgages, depending on the surrounding circumstances.” The ETB goes on to state:

In Washington a mortgage is a lien or security for the payment of money and does not pass title to the mortgagee. Therefore, the landowner [who deeded the lot to a contractor] remained the owner of the land, the taxpayer was not a speculative builder, and the Sales Tax applied to the contract price of the house.

If properly applied, the “attributes of ownership” listed in Rule 170(2)(a) provide an analytical tool to help determine whether the person with title to real property is truly the owner of the property. However, the Board of Tax Appeals did not properly apply the rule. As discussed in detail in the Department’s opening brief, the Board’s primary error was to find that capital contributions made by the investors in Stanwood Condominiums LLC and Bellingham Condominiums LLC were actually “loans” from those investors to Nord Northwest Corporation. *See* Brief of App. at 26-33. This finding, which is not supported by substantial evidence when viewed in light of the record as a whole, was critical to the Board’s analysis. *See* Brief of App. at 33, n. 7.

Nord Northwest does not directly challenge this assignment of error. *See* Brief of Resp. (no direct argument that capital contributions were correctly characterized by the Board as loans). However, Nord Northwest Corporation does state in passing that “NNC received two lines of loans; one from the bank and one from the investors.” Brief of Resp. at 11. As support for this statement, Nord Northwest cites to page 131 of the hearing transcript where Board member Kay Slonim and Mr. Nord had the following exchange:

Ms. Slonim: So it’s like you got two lines of loans. You got one from the bank and you got one from the investors. Is that what you are saying?

Mr. Nord: Yes. And we put in some of our own money.

Tr. at 131. Mr. Nord's concurrence that it was "like" Nord Northwest "got two lines of loans" is not substantial evidence that the capital contributions made by the minority investors in the two LLCs were *actually loans*.

Prior to his response to the question posed by Ms. Slonim, Mr. Nord consistently testified that the LLCs were formed to bring additional equity investors into the projects. Tr. at 119, 128. Other witnesses also testified that the LLCs were formed to bring in equity investors. Tr. at 27 (testimony of Ronald Hoelscher).² Thus, when viewed in context and in light of the record as a whole, Mr. Nord's response to Board member Slonim's question simply shows that Mr. Nord may have considered the capital contributions to be "like" loans. There was no testimony that the capital contributions were actually loans.

In any event, the objective evidence in the agency record clearly shows that the capital contributions were equity investments in the LLCs, not loans to Nord Northwest. First, there are no promissory notes or similar loan documents in the agency record whereby the minority members are purporting to loan money to Nord Northwest Corporation. Second, both LLC agreements specifically provide that each member was

² Mr. Hoelscher was a member of both LLCs, and was the only minority LLC member to testify at the hearing.

contributing money or services as that member's share of the "Initial Capital Contribution." AR at 642 (§ 8.1 of Stanwood Condominiums LLC agreement); AR at 772 (§ 8.1 of Bellingham Condominiums LLC agreement). The "Schedule 1" attached to each of the two LLC agreements specifies the amount of each member's initial capital contribution. AR at 657; AR 787. The federal partnership tax return filed by Stanwood Condominiums LLC also confirms that the amounts contributed by the minority members were capital contributions, not loans. AR at 724 (listing capital contributions of minority members). In short, the objective evidence confirms that the amounts contributed by the minority members of the LLC were capital contributions, not loans.

Mr. Nord's apparent belief that capital contributions made by minority investors in the two LLCs were "like" loans to Nord Northwest Corporation does not establish a rational basis for finding that the contributions were actually loans. Thus, the Board's finding of fact number 7 that "[t]he non-Nord LLC members who contributed cash to the LLCs were loaning money to Nord," as well as the Board's other findings that specifically or implicitly rely on this "loan" finding, are not supported by evidence that is substantial when viewed in light of the whole record. Consequently, the Board of Tax Appeals' determination that Nord Northwest Corporation met the "attributes of ownership" or otherwise

qualified as a speculative builder on the two construction projects should be reversed. RCW 34.05.570(3)(e).

3. Evidence tending to show that Nord Northwest Corporation was in control of the two construction projects is not relevant and does not provide an alternative basis for upholding the Board of Tax Appeals.

Nord Northwest Corporation also argues that there is other evidence that supports the Board's determination that Nord Northwest met the attributes of ownership set out in Rule 170(2)(a). Brief of Resp. at 7-12. For the most part, the evidence relied on by Nord Northwest is not tied to any specific findings of fact made in the Board of Tax Appeals' final decision. Rather, Nord cites to testimony of witnesses and background information in the administrative record that tend to show that Nord Northwest Corporation was in *control* of the two LLCs and was in *control* of the two construction projects. *See* Brief of Resp. at 8 ("NNC was the sole decision maker and never lost control of the property."); *Id.* at 11 ("The record is overwhelming that it was NNC that controlled every aspect of these projects including the land."); *Id.* at 12 ("NNC believed it retained complete control of the land and would not have transferred title to the land if it felt it were giving up control.").

Nord Northwest Corporation argues that control over the business decisions of the LLCs and control over the two construction projects is

relevant under Rule 170(2)(a). This is simply not so. The “attributes” listed in Rule 170(2)(a) are not designed to measure “control” of real property. If that were the purpose, the rule would set out non-exclusive “attributes of control” and would identify “control” as a relevant consideration.

Nord Northwest Corporation’s focus on control, as opposed to ownership, is a misapplication of the Department’s rule. There is no dispute that Nord Northwest Corporation and its owner, Richard Nord Sr., made virtually all decisions pertaining to the two construction projects. But that does not prove that Nord Northwest Corporation owned the real property or that it exercised any of the “attributes of ownership” identified in Rule 170(2)(a).

Nord Northwest Corporation’s argument that the Board’s final decision should be upheld based on evidence showing that Nord Northwest was in control of the construction projects should be rejected. The attributes of ownership are designed to help determine ownership of real property upon which construction activities are performed, not who is in control of the land or in control of the construction project. Control is simply not a relevant consideration under Rule 170(2)(a). Thus, even if Rule 170(2)(a) applied where ownership of the land is not in dispute, evidence that Nord Northwest was in control of the two construction

projects does not establish an alternative basis for upholding the Board of Tax Appeal's final decision.

4. The Department's "Construction Tax Guide" does not control over the plain language of the statute, and does not support Nord Northwest Corporation's claim that it was a speculative builder.

Nord Northwest Corporation asserts that a Department publication entitled "Construction Tax Guide" supports its claim that it was a speculative builder with respect to the Stanwood and Bellingham construction projects. Brief of Resp. at 6. Nord Northwest Corporation is incorrect.

First, it should be beyond any reasonable dispute that a publication issued by the Department of Revenue will not control over the plain language of RCW 82.04.050(2)(b). *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 428, 833 P.2d 375 (1992) (an administrative agency cannot amend or modify a statute). Therefore, even if the Construction Tax Guide could be read in the manner suggested by Nord Northwest, the Tax Guide would not override the statute.

Second, the Construction Tax Guide supports the Department in this case, not Nord Northwest Corporation. That Guide provides in part that "[t]he owner of real property is generally the holder of the recorded title. However, it is possible for a person to hold title to real property

which he/she does not own. Therefore, attributes of ownership, other than mere title to the property, may determine the tax application.” AR at 590. The Guide goes on to explain that the purpose of the attributes of ownership is to “establish who has the rights and liabilities of a property owner. That is, who has the ownership rights and liabilities to the extent that a court would call the person the owner of real property, despite the fact that someone else may hold mere bare title to the property.” *Id.* Who a court would call the owner of real property is determined by statutory and case law. The “attributes of ownership” set out in Rule 170(2)(a) and repeated in the Department’s Construction Tax Guide are not designed to undermine statutory and common law relating to property ownership. Rather, they are designed as an analytical tool to help determine who would be considered the owner of real property under the law.

In this case, there is no reasonable dispute that Stanwood Condominiums LLC and Bellingham Condominiums LLC held fee simple ownership of the real property at issue. First, the real property was conveyed to the LLCs by written deed. AR at 660, 796. Under Washington law, a statutory warranty deed warrants to the grantee fee simple ownership of the property therein described. RCW 64.04.030. A quitclaim deed warrants to the grantee in fee “all of the then existing legal and equitable rights of the grantor in the premises therein described.”

RCW 64.04.050. Thus, with respect to the Stanwood property, which was conveyed to Stanwood Condominiums LLC by statutory warranty deed, there is no question that the LLC acquired fee simple ownership of the land. With respect to the Bellingham property, which was conveyed to Bellingham Condominiums LLC by quitclaim deed, the LLC acquired “all of the then existing legal and equitable rights of the grantor.” RCW 64.04.050. There is no evidence in the record suggesting that the “then existing legal and equitable rights” were anything less than fee simple ownership. *See* AR at 763 (Nord Northwest Corporation acquired the Bellingham property by statutory warranty deed shortly before quitclaiming the property to Bellingham Condominiums LLC). *See also* AR at 862 (finished condominium unit transferred by Bellingham Condominiums LLC to buyer by statutory warranty deed, thereby conveying fee simple ownership of that condominium unit).³

Moreover, there is no evidence in the agency record that the LLCs held title to the land under an equitable mortgage or as trustee of an express trust. Consequently, there is no basis to conclude that legal title and beneficial ownership were divided after the LLCs acquired the real property or that the LLCs held less than fee simple ownership during the

³ If Bellingham Condominiums LLC has received less than fee simple ownership in the real property when it acquired the property by quitclaim deed, the subsequent conveyance of fee simple ownership of the finished condominium units by statutory warranty deed could potentially cloud title to those units.

construction of the condominiums. Finally, Nord Northwest Corporation has admitted that the LLCs owned the land. Tr. at 214 (Richard Nord Sr. conceded in his closing argument to the Board of Tax Appeals that “we knew we didn’t own the property. We admit we don’t own the property.”). Under these circumstances, it is apparent that the LLCs were bona fide owners of the real property and retained fee simple ownership of the property during construction of the condominiums. Because the LLCs are separate legal entities from Nord Northwest Corporation, RCW 25.15.070(2)(c), it therefore follows that Nord Northwest Corporation did not own the real property as a matter of law.

Nothing in the Department’s Construction Tax Guide reasonably supports Nord Northwest Corporation’s argument that it should be treated as a speculative builder even though it did not own the real property at issue. Nord Northwest Corporation was not the owner of the real property under Washington law, and nothing in the Department’s Construction Tax Guide can change that fact. Because Nord Northwest did not own the real property upon which the Stanwood and Bellingham condominiums were built, it was not a speculative builder on those projects. The Board of Tax Appeals erred as a matter of law when it concluded otherwise.

5. There is no “double taxation” in this case.

Nord Northwest Corporation also argues that “[i]t would constitute a double taxation against NNC for this assessment to stand.” Brief of Resp. at 13. This is incorrect. The taxes at issue in this case are retail sales tax and retailing B&O tax that Nord Northwest Corporation neglected to collect or pay on the construction services it performed for two LLCs. There is no evidence that Nord Northwest Corporation is being subjected to the same tax twice for its construction services. While Nord Northwest did pay retail sales tax on materials it purchased, that sales tax was credited back to Nord Northwest in the audit. AR 489 (audit report discussing of “Schedule 5 – Credit for Retail Sales Tax Paid at Source”). Nord Northwest has never suggested that the amount of the credit was incorrect.

In support of its “double tax” argument, Nord Northwest seems to refer to the Washington real estate excise tax imposed under chapter 82.45 RCW. Brief of Resp. at 13. That tax is imposed on every sale of real property in this state. RCW 82.45.060. The tax applied to the sale of finished condominium units by Stanwood Condominiums LLC and Bellingham Condominiums LLC. The sale of finished condominium units is a separate taxable event from the construction of those units. Therefore, the fact that real estate excise tax is owed on the sale of the finished

condominium units does not create a “double tax.” *Cf., Drury the Tailor v. Jenner*, 12 Wn.2d 508, 515, 122 P.2d 493 (1942) (excise taxes imposed on different taxable activities did not result in illegal double taxation).

Moreover, real estate excise tax would also have been owed had Nord Northwest Corporation constructed the condominiums on land that it owned. In that scenario Nord Northwest would have owed the real estate excise tax on its sale of the finished condominium units. In short, the sale of the condominium units was a taxable event subject to the real estate excise tax without regard to whether those units were constructed by Nord Northwest Corporation as a prime contractor or as a speculative builder.

There is no merit to Nord Northwest Corporation’s “double taxation” argument. Nord Northwest simply confuses the retail sales tax and retailing B&O tax owed on the construction services it performed for the two LLCs with the real estate excise tax owed when the finished condominium units were sold. Because these are distinct taxable events, there is no “double taxation.”

B. The Board Erred In Finding That Nord Northwest Corporation Held The Beneficial Ownership Of The Real Property Under The Resulting Trust Doctrine.

As its final argument, Nord Northwest Corporation asserts that it held the beneficial ownership in the Stanwood and Bellingham properties

under the common law “resulting trust” doctrine. Brief of Resp. at 13.

Nord is incorrect.

In certain situations where no express trust has been created, a court exercising its equitable powers may impose a “resulting trust.” *See Manning v. Mount St. Michael’s Seminary*, 78 Wn.2d 542, 545, 477 P.2d 635 (1970) (listing situations where a resulting trust may arise). One circumstance where a resulting trust may arise is “[w]here property is purchased and the purchase price is paid by one person and at his direction the vendor transfers the property to another person.” *Manning*, 78 Wn.2d at 545 (citing Restatement (Second) of Trusts, §§ 440-460 (1959)). Thus, where property is purchased by one person but titled in the name of another, the person with legal title is presumed to hold the property in trust for the benefit of the purchaser absent evidence of contrary intent. *In re Estate of Spandoni*, 71 Wn.2d 820, 822, 430 P.2d 965 (1967).

However, a resulting trust is not created where the “transfer of property is made to one person and the purchase price is advanced by another as a loan to the transferee.” Restatement (Second) of Trusts, § 441 comment c (1959). *See also* 76 Am. Jur. 2d *Trusts* § 157 (2005) (“For a resulting trust to exist, the would-be beneficiary must have paid the purchase money as his or her own, and not as a loan to the title holder.”). This principle was expressly recognized by the Washington Supreme

Court in *Thompson v. Hunstad*, 53 Wn.2d 87, 330 P.2d 1007 (1958). In that case M. J. Thompson paid \$8,000 for real property that was then titled in the name of Mr. and Mrs. Conrad Hunstad. *Id.* at 88. Prior to the purchase, the Hunstads had orally agreed to execute a note and mortgage in favor of Thompson for the purchase price and to pay Thompson \$50 per month on the loan. *Id.* However, once the property was titled in the name of the Hunstads, they refused to honor the oral agreement. Thompson sued, claiming that the transaction created a resulting trust under which the Hunstads held legal title to the property subject to Thompson's beneficial interest as mortgagee. *Id.* at 89.

The Washington Supreme Court rejected Thompson's "resulting trust" argument. After restating the general rule regarding the creation of resulting trusts, the Court recognized that a resulting trust is not created "where the purchase price is advanced by one person as a loan to another." *Id.* Because the purchase price of the property was advanced by Thompson as a loan to the Hunstads, no resulting trust was created. The Hunstads owned the property in fee simple. Thompson's only remedy for the breach of the oral promise was to seek restitution from the Hunstads for the money he advanced on their behalf. *Id.* at 91.

Thompson v. Hunstad sets out the rule in Washington that a resulting trust is not created where the purchase price is advanced as a

loan to the person who receives title to the property. In the present case, the undisputed evidence establishes that the amounts paid to acquire the Stanwood and Bellingham properties were accounted for as a loan by Nord Northwest Corporation to the LLCs. More specifically, the Department's auditor testified that after title to the properties were deeded to the LLCs, Nord Northwest Corporation accounted for the cost of the land as an account receivable, and the LLCs treated the cost of the land "as a payable back to . . . Nord Northwest." Tr. at 193-94. In addition, during cross examination, the auditor testified that the accounting records maintained by Nord Northwest Corporation and the two LLCs showed that the LLCs had paid for the land with funds loaned by Nord Northwest Corporation. Tr. at 208. This testimony was unrefuted.

To establish a resulting trust, Nord Northwest Corporation was required to prove by clear, cogent, and convincing evidence that it paid for the Stanwood and Bellingham properties outright and directed that title be transferred to the LLCs without any right to future repayment. Nord has not met that burden. Rather, the undisputed evidence shows that the two LLCs acquired the real property with money advanced by Nord Northwest Corporation as a loan. Tr. at 193-94, 208. As expressly held by the Washington Supreme Court in *Thompson v. Hunstad*, no resulting trust

arises where—as here—the purchase price is advanced as a loan to the person taking title to the land. *Thompson*, 53 Wn.2d at 89.

The Board of Tax Appeals’ finding that a resulting trust was created under the facts of this case was incorrect as a matter of law and should be reversed. The LLCs held both legal and beneficial ownership of the real property, and were consumers of the retail construction services performed by Nord Northwest Corporation.

C. Even If A Resulting Trust Had Been Created, Nord Northwest Corporation Would Still Have Been Performing Retail Construction Services Upon Real Property Of A “Consumer.”

RCW 82.04.050(2)(b) provides that the term “‘retail sale’ shall include . . . [t]he constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon or above real property of or for consumers” A “consumer” includes “[a]ny person who is an owner, lessee or has the right of possession to or an easement in real property which is being constructed, repaired, decorated, improved, or otherwise altered by a person engaged in business.” RCW 82.04.190(4). The Legislature did not limit the definition of “consumer” only to a person holding fee simple ownership in real property. A person holding a leasehold or other possessory interest in real property also qualifies as a “consumer” of construction services.

Under a resulting trust, where ownership is divided into its legal interest and its beneficial interest, the person holding the legal title to the real property retains the right of possession, albeit in trust for the beneficial owner. *See* Restatement (Second) of Trusts, § 2 comment f (1959) (describing the distinction between legal interest and equitable interest). The person holding the legal interest in real property—with the corresponding right of possession—is a “consumer” under the plain language of RCW 82.04.190(4).

In the present case, even if a resulting trust had been created whereby the LLCs held title to the real property in trust for the benefit of Nord Northwest Corporation, the LLCs still would have had a possessory interest in the property. Consequently, Nord Northwest still would have been performing construction services on real property “of or for consumers,” and would not have qualified as a speculative builder. Thus, the Board of Tax Appeals’ determination that Nord Northwest qualified as a speculative builder under the resulting trust doctrine was incorrect as a matter of law and should be reversed. RCW 34.05.570(3)(d).

III. CONCLUSION

Nord Northwest Corporation did not own the real property upon which it constructed the Stanwood and Bellingham condominiums. As a result, Nord Northwest Corporation was not a speculative builder with

respect to those two constructions projects. The Board of Tax Appeals' decision to the contrary is incorrect as a matter of law and is not supported by substantial evidence. Consequently, this Court should reverse the decision of the Board of Tax Appeals.

RESPECTFULLY SUBMITTED this 3rd day of January, 2011.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in cursive script that reads "Charles Zalesky". The signature is written in black ink and is positioned above a horizontal line.

CHARLES ZALESKY, WSBA No. 37777
Assistant Attorney General
Attorneys for Appellant

FILED
COURT OF APPEALS
DIVISION II

NO. 40601-2-II

11 JAN -4 PM 12:07

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
DEPUTY

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Appellant,

v.

NORD NORTHWEST
CORPORATION,

Respondents.

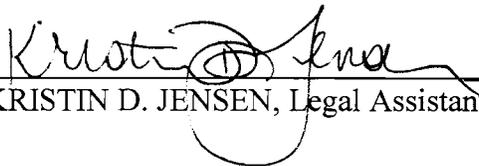
CERTIFICATE OF
SERVICE

I certify that on January 3, 2011, I caused to be served a true and correct copy of the Reply Brief of Appellant, via personal delivery, on the following:

Martin D. Meyer, Esq.
U.S. Bank Building, Suite 12
402 South Capital Way
Olympia, WA 98501

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

DATED this 3rd day of January, 2011, at Tumwater, Washington.


KRISTIN D. JENSEN, Legal Assistant