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No. 41298-5-II

COURT OF APPEALS DIVISION TWO  
OF THE STATE OF WASHINGTON

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JOHN R. WYSS  
Plaintiff/Appellant

vs.

GRAYS HARBOR COUNTY, RESPONDENT

Defendant/Appellee

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APPEAL FROM SUPERIOR COURT  
FOR THURSTON COUNTY

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**APPELLANT'S REPLY BRIEF**

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Scott E. Stafne, WSBA # 6964  
Andrew J. Krawczyk, WSBA #42982  
Attorneys for Appellant

Stafne Law Firm  
239 N. Olympic Avenue  
Arlington, WA 98223  
Phone: 360-403-8700  
Fax: 360-386-4005

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## COMMISSIONER'S RULING

Respondent Grays Harbor County (County) has moved for sanctions again. County's Response Brief, (County's brief) pp. 21-23. The County previously filed a "Motion on the Merits to Affirm" (hereafter referred to as "MOM") (a copy is attached hereto as Appendix 1), which also requested sanctions. The MOM was denied in its entirety. *See* Commissioner's Ruling denying MOM (hereafter referred to as "ruling") (a copy is attached as Appendix 2 hereto). In the ruling the Commissioner states:

The issues that Wyss raises are legal, rather than factual, and do not involve the trial court's discretion. There is little published authority on those issues. The issues are not clearly controlled by settled law, so this court cannot say the Wyss's appeal is clearly without merit.

Ruling, App. 1, at 2. Appellant Wyss's responded to the MOM (hereafter referred to as "Resp. to MOM"), which is attached hereto as Appendix 3.

With limited exceptions, the County's Brief to Wyss's opening merits brief is virtually identical to its MOM. The Commissioner's ruling should have advised the County of the inappropriateness of continuing its motion for sanctions in its merits brief.

The only new argument the County raises in its merits brief is section B., which contends "Wyss failed to join the City as a necessary

party, requiring dismissal of his complaint." County Brief at 7-9. In order to facilitate the logical sequence of his reply Wyss will address the new argument in the final section of this brief. *Infra* at pp. 16-21.

**REPLY to "Introduction and Counter Statement of Facts", County Brief, p. 1-4.**

This section of the County's Brief is almost identical to section "III. FACTS RELEVANT TO THE MOTION" set forth in the County's MOM.<sup>1</sup> There is only one difference between the MOM and the County's brief in this section. *See* County Brief at 4, ¶ 1 where the County added a sentence to the first paragraph of page 4, which states: The County Assessor's dissolution of Wyss' lot "was not taken at the direction of the City Attorney". Wyss objects and moves to strike this factual statement as it is not referenced to the record as is required by RAP 10 (3)(a)(5). It is also untrue. *See* CP 162-163.

Wyss also incorporates herein "REPLY to III. Facts Relevant to Motion to Strike" at pp. 3 - 11 of its Response to the MOM as part of its reply to the County's merits brief.

**REPLY to "Wyss improperly collaterally attacks the 2005 superior court judgment", County Brief, p. 9-10.**

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<sup>1</sup>Both sections begin with "On September 21, 1999, ... " and end with "This appeal followed."

Strangely, the County does not define the elements of res judicata and/or collateral estoppel in the County's Brief. A case which applies res judicata is *Hayes v Seattle*, 131 Wn.2d 706, 934 P.2d 1179 (1997). With regard to res judicata the Supreme Court states at page 712:

The purpose of the doctrine of res judicata is to ensure the finality of judgments. Under this doctrine, a subsequent action is barred when it is identical with a previous action in four respects: (1) same subject matter; (2) same cause of action; (3) same persons and parties; and (4) same quality of the persons for or against whom the claim is made.

*Hayes v Seattle*, 131 Wn.2d 706, 712, 934 P.2d 1179 (1997).

In *Hayes* there was no dispute that factors three and four were met. That is not true here. This case does not involve the same parties. Hoquiam is not Grays Harbor County for purposes of platting and creating subdivisions. Indeed, the legislature has promulgated statutes as to what must be done to vacate a plat map or subdivision that is created by County officials in violation of a city's subdivision laws. *See RCW 58.17.190*<sup>2</sup>; *RCW 58.17.212*. If Hoquiam wanted the County to vacate Wyss' recorded plats and/or lots and/or subdivisions, as opposed to simply voiding Wyss' transfer of land to his son, Hoquiam was required to follow those appellate

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<sup>2</sup> RCW 58.17.190 states:

The county auditor shall refuse to accept any plat for filing until approval of the plat has been given by the appropriate legislative body. ***Should a plat or dedication be filed without such approval, the prosecuting attorney of the county in which the plat is filed shall apply for a writ of mandate in the name of and on behalf of the legislative body required to approve same, directing the auditor and assessor to remove from their files or records the unapproved plat, or dedication of record.***

legal procedures the legislature devised to achieve such a result. *Id.* See also *James v. County of Kitsap*, 154 Wn.2d 574, 115 P.3d 286 (2005) (applying LUPA to impact fees related to a subdivision.); *Friends of Cedar Park Neighborhood v. City of Seattle*, 156 Wn. App. 633, 234 P.3d 214 (2010) (applying LUPA to challenge relating to subdivision.) Cf. *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002) (applying LUPA to a ministerial boundary line adjustment which, in effect, created a three lot short subdivision).

Simply asking the County to provide such a remedy more or less as a favor to Hoquiam in 2009 (a decade later) because the city attorney believed the superior court's 2005 order also applied to Gray Harbor County was not appropriate because Wyss is not and never was the equivalent of the County, i.e. in other words "the same quality of the persons for and against whom the claim is made." *Grundy v. Thurston County*, 155 Wn.2d 1, 8, 117 P.3d 1089, 1092 (2005). Just as the Court noted in *Grundy* "Whether the county illegally issued an administrative shoreline exemption to the Bracks was not decided by the trial court, so it is not properly before us.", the question of whether the County created and should dissolve the illegal subdivision was not an issue before the superior court or this Court when it affirmed the ruling against Wyss in 2005 and 2006 respectively.

If Hoquiam wanted the County to vacate the subdivision or dissolve the lots in 2009 it should have brought an action against the County. *Id.* Similarly, if Hoquiam had wanted to apply its 2007 abatement lien against all of Wyss' property it should have done so in the first instance pursuant to its own ordinances and/or LUPA and the jurisdictional limitations relating to each. *West v Stahley*, 155 Wn. App. 691, 229 P.3d 943 (2010); *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 223 P.3d 1172 (2009).

In *Hayes v Seattle* the primary issues related to whether the lawsuit in question involved the "same subject matter" and "same cause of action" as that which was brought in the first suit. The Court decided the two cases were disparate even though they involved the same parties and related facts. In this regard the Court observed the first

"... action for judicial review focused exclusively on the propriety of the decision making process of the Seattle City Council. On the other hand, the subsequent action was for a judgment for money to compensate Hayes for the damages he allegedly suffered as a result of the Council's action."

Here all of Wyss' previous actions related to his untimely appeal of Hoquiam's the city's decision to demolish his building and then his federal cause of action under 42 USC §1983 for the destruction of his improvements. After the federal court dismissed Wyss' claims and refused to decide whether Wyss' deed to his son was void, the subsequent state

court action brought by the County sought to enjoin and declare Wyss' transfer of land invalid and unlawful. **This lawsuit involves entirely different complaints.** The first relating to 2007 (when the City filed its abatement lien on only one lot) and the second occurring in 2009 when the city attorney convinced Grays Harbor County to dissolve one lot of the subdivision which had existed on the County's tax rolls since 1999. "Res judicata does not bar claims which arise out of a transaction separate and apart from the issue previously litigated." *Hayes*, 131 Wn.2d at 11.

Collateral estoppel is different than res judicata, but also promotes the policy of ending disputes by preventing the re-litigation of an issue or determinative fact after the party estopped has had a full and fair opportunity to present a case. *See e.g. McDaniels v. Carlson*, 108 Wn.2d 299, 303, 738 P.2d 254 (1987); *Seattle-First Nat'l Bank v. Cannon*, 26 Wn. App. 922, 927, 615 P.2d 1316 (1980).

Collateral estoppel requires:

(1) the issue decided in the prior adjudication be identical with the one presented in the action in question; (2) there is a final judgment on the merits in the first action; (3) The party against whom the plea is asserted be a party or in privity with a party to the prior adjudication; and (4) the application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

*See e.g. McDaniels v. Carlson*, 108 Wn.2d at 303 (1987). The burden of proof is on the party asserting estoppel. *Alaska Marine Trucking v.*

*Carnation Co.*, 30 Wn. App. 144, 633 P.2d 105 (1981). This Court has required the party asserting collateral estoppel based on a summary judgment to produce the record of those proceedings. *See e.g. State v. Barnes*, 85 Wn. App. 638, 932 P.2d 669, (1997).

The County cannot and does not even try to argue that the elements of collateral estoppel are met in this case. The issue which is being litigated in this appeal, i.e. the application of the abatement lien in 2007 on one lot only and the dissolution of lots by the County in 2009, had not taken place in 2005 and could not have been a subject of that litigation.

The City's failure to appeal the application of its abatement lien in 2007 is final and cannot be collaterally attacked. CP 151, §906; *West v. Stahley*, 155 Wn. App. 691, 229 P.3d 943 (2010); *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 223 P.3d 1172 (2009). But that is precisely what is happening here without any due process at all. CP 159-167. By equating the judgment against Wyss as a judgment against the County requiring the vacation of the subdivision, Hoquiam circumvents its responsibility to have timely appealed the application of its abatement lien in 2007. By informally modifying Wyss' subdivision, the County avoids having to follow any process relating to an appeal of the existing subdivision or creation of two lots on the County's plat maps. This harms Wyss by depriving him of the limitations period which would normally

bar any collateral attacks on these decisions. This is because in Washington even illegal land use decisions "must be challenged in a timely, appropriate manner." *Habitat Watch v Skagit County*, 155 Wn.2d 397, 407, 120 P.3d 56 (2005) (citing *Pierce v. King County*, 62 Wn.2d 324, 334, 382 P.2d 628 (1963)); *Stientjes Family Trust v. Thurston County*, 152 Wn. App. 616, note 8, 217 P.3d 379 (2009).

In summary, it is obvious the County chose not to discuss the criteria for res judicata and collateral estoppel in their MOM and merits brief because those judicial doctrines do not even arguably apply to this case. This is an entirely different case than that which Hoquiam brought against Wyss in 2005. This case involves an entirely different defendant which has entirely different duties than does Hoquiam with regard to the issues raised here. Finally, this case is based on entirely different events -- events which had not even occurred until well after the 2005 litigation was resolved.

**REPLY to "Assignment of Tax Parcel Numbers is not a Land Use Action", County Brief, p. 9-10.**

The County next argues in its MOM and merits brief that "[a]ssignment of tax parcel numbers by a County Assessor is not a 'land use decision' under RCW 36.70C.020 (2)". County Brief at 11-17; *see also*, MOM at 6-10. The County appears to have purposely chosen to

ignore the previously cited statutes in Wyss's response to the Motion (Resp. to MOM at 2-3, 20-22) which caused the Commissioner to find: "There is little published authority on those [statutory] issues. Thus, the issues are not controlled by settled law...". Commissioner Ruling, App. 1, p. 2.

This case is not about the County Assessor assigning tax numbers, it is about real property records, lots and subdivisions. Wyss's testimony implicated the County's official plat map which showed that two lots or a two lot subdivision existed on Wyss's property. CP 124¶3, 138-139. Wyss testimony in this regard was not disputed. Other evidence attested to the fact that the County had created two lots out of Wyss's property. CP 156-163. A panel of this Court held that an illegal subdivision had been created. CP 56. The significant factor under Washington law was not that a new tax number had been created but that the County (apparently mistakenly) created and recorded a plat map, which remained in place for over a decade, showing two lots on Wyss's property.

It is not clear from either the County's merits brief, or earlier MOM, whether the County is contending it had no authority to create "plats" maps for property in Hoquiam. However, notwithstanding this issue being clearly raised in Wyss's response to the MOM (Resp. to MOM at 1-3, 12 note 3, 18-19), the County Brief avoids any discussion in its

merits brief of the three statutes, which clearly state the County has this authority. *see* RCW 58.10.010, RCW 58.18.010; RCW 58.17.190.

Wyss contends these statutes are clear on their face and that the words in each statute should be given their ordinary meaning based on dictionary definitions. *See Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 920-21, 969 P.2d 75 (1998). (An undefined term is “given its plain and ordinary meaning unless a contrary legislative intent is indicated.”).

RCW 58.10.010 states:

All city or town plats or any addition or additions thereto, heretofore made and recorded in the county auditor's office of any county in Washington State, showing lots, ...***shall be conclusive evidence of the location and size of the lots,...***

RCW 58.10.010 (Emphasis supplied).

The Merriam-Webster Online Dictionary (“MW Dictionary”) defines the word “conclusive” to mean: “putting an end to debate or question especially by reason of irrefutability.”<sup>3</sup> Therefore, under the statute the County's plat showing two lots at the time the lien was filed constituted conclusive evidence of the existence of both lots.

Similarly, RCW 58.18.010 states:

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<sup>3</sup>Citations for MW Dictionary are as follows: Merriam-Webster Online Dictionary, *conclusive, official, all, legal, purpose, available at:* <http://www.merriam-webster.com/dictionary> (last visited July 31, 2011)

In any county where an assessor has and maintains an adequate set of maps drawn from surveys at a scale of not less than two hundred feet to the inch, the assessor may with the permission of the county commissioners, file an assessor's plat of the area, ***which when filed shall become the official plat for all legal purposes, ...***

RCW 58.18.010 (Emphasis supplied).

The language of the statute is not ambiguous. The Assessor's plat map when the abatement lien was adjudicated showed Wyss had two lots. This was ***the official plat for all legal purposes***. The MW Dictionary defines "official" when used as an adverb in the context of the statute to mean "*a: AUTHORITATIVE, AUTHORIZED <official statement> b: prescribed or recognized as authorized <an official language>*."<sup>4</sup>

The MW Dictionary defines "all" in the context of the statute to mean:

- a: the whole amount, quantity, or extent of <needed all the courage they had> <sat up all night> b: as much as possible <spoke in all seriousness>*
- 2: every member or individual component of <all men will go> <all five children were present>*
- 3: the whole number or sum of <all the angles of a triangle are equal to two right angles>*
- 4: EVERY <all manner of hardship>*
- 5: any whatever <beyond all doubt>*.<sup>5</sup>

The term "legal" as used in RCW 58.18.010 is defined by the MW Dictionary to mean:

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<sup>4</sup>See Note 3, Supra

<sup>5</sup>Id.

1: of or relating to law  
2a: deriving authority from or founded on law: DE JURE b: having a formal status derived from law often without a basis in actual fact: TITULAR <a corporation is a *legal* but not a real person> c: established by law; *especially*: STATUTORY

The MW Dictionary defines the noun "purpose" to mean:

a: something set up as an object or end to be attained: INTENTION b: RESOLUTION, DETERMINATION 2: a subject under discussion or an action in course of execution.<sup>6</sup>

Taken together these words "the official plat for all legal purposes" indicate a legislative intention that official plats of cities and towns created by the County officials are valid for all legal purposes, not just tax purposes. *See* RCW 58.18.010.

RCW 58.17.190, which is a specific provision in the subdivision Chapter, sets forth the only way by which a mistake made by a County official that affects plats, parcels, and lots in a City can be changed. This statutory provision states in pertinent part:

The county auditor shall refuse to accept any plat for filing until approval of the plat has been given by the appropriate legislative body. ***Should a plat or dedication be filed without such approval, the prosecuting attorney of the county in which the plat is filed shall apply for a writ of mandate in the name of and on behalf of the legislative body required to approve same, directing the auditor and assessor to remove from their files or records the unapproved plat, or dedication of record.***

RCW 58.17.190 (Emphasis Supplied).

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<sup>6</sup>Id.

Statutes are to be construed so as not to contain superfluous provisions. Under the canons of statutory construction Washington Courts "interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous." *Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010).

If the County does not have the authority to document plats within a city, as the County implies, then RCW 58.17.190 and/or Ch. 36.70B RCW would be superfluous. If County and City officials can simply informally correct platting mistakes among themselves without following any formal judicial procedure then the methods for correcting mistakes envisioned by the legislature are superfluous. Under these circumstances, the only approach would have been for the County and City to follow these three provisions.

Wyss incorporates pages 11-17 of his Response (Resp. to MOM at 17-22) herein as part of his reply to the County's merits brief relating to "Assignment of tax parcel numbers".

**REPLY to "The County has no land use decision authority over Wyss' real property located within the corporate limits of the City of Hoquiam", County Brief, p. 17-19.**

Wyss notes this section of the County's brief is similar to the same section of the MOM. *Compare* MOM at 9-10 *with* County Brief at 17-19.

Both the County's Brief and MOM are premised on the notion that the County has no authority to make any decisions affecting land within Hoquiam's boundaries. *Id.* But this premise is mistaken as the legislature has afforded such power to the counties. *See* RCW 58.10.010, RCW 58.17.190, RCW 58.18.010.

Rather than address these specific statutes, the County chooses to pretend they do not exist. *See* County Brief at 17-19; *see also*, MOM at 9-10. Yet, it is clear from this case that County platting errors can affect lots and boundaries within a city's jurisdiction. The procedure for correcting such errors is set forth by statute and the judiciary and there is no statute or Constitutional provision which provides that an informal ad hoc procedure by a City Attorney and a County Assessor can be used consistently with Const. Art. I, § 3 or § 16 to dissolve and/or modify the boundaries relating to real property. *See* Const. Art. I, § 3 or § 16; RCW 58.17.190; *see also* Ch. 36.70C RCW.

Additionally, the County suggests Washington's policy favoring the finality of land use matters does not apply in this case, but the County proffers no authority in support of this contention. County's brief, p. 16. Washington land use law favors final decisions to promote certainty and stability in the disposal of real property. *See Woods v. Kittitas*, 162 Wn.2d 597, 614, 174 P.2. 597 (2009). Our Supreme Court has applied LUPA's

finality policy in cases where other statutes may have provided for longer limitations periods than those imposed by LUPA's shorter limitations period. See e.g., *Twin Bridge Marine Park, L.L.C. v. State, Dept. of Ecology*, 162 Wn.2d 825, 175 P.3d 1050 (2008) (LUPA's 21-day jurisdictional limitation precluded Department of Ecology's enforcement action pursuant to Shorelines Management Act); *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 26 P.3d 241 (2001) (construing a federal act, 16 U.S.C. § 544m(a), no collateral attack on a local final land use decision can be made when no timely appeal is filed); *Samuels Furniture v. Department of Ecology*, 147 Wn.2d 440, 448-461, 54 P.3d 1194 (2002).

The County offers no authority as to why Washington's policy of finality regarding land use matters would not apply here where the County seeks to informally undo a decade old plat map by way of an informal procedure which provided no notice or hearing or other form of due process.

**REPLY to "The 2005 Grays Harbor County Superior Court properly invalidate and 'rescinded' Wyss purported to lot subdivision" (County Brief, pp. 19-21) and "Wyss failed to join the City as a necessary party" County Brief, pp. 7-9.**

If Hoquiam can bring an action against Wyss in 2005 and thereby invalidate a land use decision made in 1999 modifying his property,

Washington's strong policy favoring the finality of land use decisions is at an end. Indeed, this Court's holding in 2006 that statutes of limitations do not apply to a city's action against individuals regarding land use transactions (CP 56-57) would eviscerate any policy of finality if it can be avoided by a municipality simply filing an action years later against an individual to avoid having to comply the statutory mechanisms in place to achieve such a result. Had this Court intended to break such new ground it likely would have published its earlier opinion as it would have been precedential. *See* RCW 2.06.040.

This case is much like *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002), where a County official made a ministerial mistake and created a three lot subdivision when he granted a boundary line adjustment. Neighbors and the County sued the applicant and prevailed in the Superior Court and the Court of Appeals and obtained a ruling allowing the County to undo the ministerial mistake even though LUPA's 21 day limitation period had run. The Supreme Court disagreed with the lower courts and required that even municipalities meet LUPA's limitations period if they want to challenge their own decision. If Hoquiam can wait 5 years and bring an original against Wyss and thereby overturn a plat map of the County then LUPA and other statutory provisions granting superior courts only appellate jurisdiction will be

effectively overruled. *See e.g. Davis v. Washington State Dept. of Labor & Industries*, 159 Wn. App. 437, 441-3, 245 P.3d 253 (2011) (Superior Court has no subject matter jurisdiction to entertain a cause of action pursuant to its original jurisdiction where statute only provides for appellate jurisdiction.)

Additionally, the County argues that "Wyss failed to join the City as a necessary party". County's Brief at 7-9. This contention by the County invokes an analysis of this and the Superior Court's subject matter jurisdiction over this case. *Id.* Similarly, Wyss has challenged herein the subject matter jurisdiction of the Superior Court and this Court to have issued a ruling binding on the County in 2005 in an action to which the County was not a party.

A party may challenge subject matter jurisdiction at anytime, and a judgment entered by a court lacking jurisdiction is void. *ZDI Gaming, Inc. v. State ex rel. Washington State Gambling Comm'n*, 151 Wn. App. 788, 214 P.3d 938, 945 (2009); *Inland Foundry Co., Inc. v. Spokane County Air Pollution Control Auth.*, 98 Wn. App. 121, 123-24, 989 P.2d 102 (1999), *review denied*, 141 Wn.2d 1007, 10 P.3d 1073 (2000).

Subject matter jurisdiction is the authority of the court to hear and determine the type of action before it. *Davis v. Washington State Dept. of Labor & Industries*, 159 Wn. App. 437, 441-3, 245 P.3d 253

(2011); *Davidson Serles & Associates v. City of Kirkland*, 159 Wn. App. 616, 246 P.3d 822, 827-28 (2011); *In re Adoption of Buehl*, 87 Wn.2d 649, 655, 555 P.2d 1334 (1976). Although a court may ultimately decide that it lacks subject matter jurisdiction, a court always has the jurisdiction to determine whether subject matter jurisdiction is proper. *In re Marriage of Robinson*, 159 Wn. App. 162 (2011); *In re Marriage of Kastanas*, 78 Wn. App. 193, 201, 869 P.2d 726 (1995); CR 12 (h) (3). A trial court's decision as to subject matter jurisdiction is a question of law that is reviewed de novo. *Conom v. Snohomish County*, 155 Wn.2d 154, 157, 118 P.3d 344 (2005); *Young v. Clark*, 149 Wn.2d 130, 132, 65 P.3d 1192 (2003); *Crosby v. Spokane County*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999).

The County claims for the first time on appeal that Hoquiam was a necessary party to Wyss's action for injunctive and declaratory relief. County's Brief at 7-9. Wyss brought his action against the County for the Assessor's informal dissolution of Wyss's two lots into one so that the City of Hoquiam could foreclose on two of Wyss' lots; rather than on the one lot the City assessed pursuant to abatement hearing process. In support of its new subject matter jurisdiction argument the County relies on *Henry v. Town of Oakville*, 30 Wn. App. 240, 633 P.2d 892 (1981). County Brief at 8.

Wyss contends *Henry* supports his position. The County asks this Court to hold the Superior Court's rescission of Wyss' transfer of his lot to his son rescinded the parcels and/or subdivision mistakenly created on the County's parcel maps. County Brief at 19-21. But Washington statutes specifically provide how mistakes made by the County officials in this regard are to be corrected. *See* RCW 58.17.190. To the extent the city wanted a Superior Court to change the County's plat map, a mandate or appellate action should have been timely brought against the County. *Id.*; *see also*, RCW 36.70C (LUPA). As the County was a necessary party to Hoquiam's action against Wyss (to the extent Hoquiam sought relief to change the County's plat map) Hoquiam's failure to join the County deprived the Superior Court and this Court of any jurisdiction requiring the County to change its plat map as a result of the decision against Wyss. *See Grundy v. Thurston County*, 155 Wn.2d 1, 8, 117 P.3d 1089, 1092 (2005); *see also Henry*, *supra*.

The County's requests this Court rule that its previous unpublished decision, which was in favor of Hoquiam and against Wyss, implicitly changed the County's parcel map. This request is no different than the City's request for a "legal" favor from the Assessor to accomplish the same result. CP 162-3.

*Henry does not apply* to Wyss's most recent declaratory and injunctive actions against the County as they are based on a challenge to the County Assessor's alleged illegal procedure voiding Hoquiam's final administrative decision placing an assessment lien on only one of the lots shown by the County's parcel map. Clearly, Hoquiam was a party to the original administrative proceeding which placed the lien on only one of the two lots as Hoquiam brought that administrative action against Wyss. The only way for Hoquiam to have changed the result of this final administrative decision judicially would have been to file a timely appeal. *See* OB, pp 16-22 (and authorities cited therein); *see also* Resp. to MOM at 15-16 (and authorities cited therein). Once the assessment decision became final Hoquiam had no right to collaterally attack its own final decision judicially. RCW 36.70C.020 (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..."); *see also, Humphrey Industries, Ltd. v. Clay Street, LLC*, 170 Wn.2d 495, 505, 242 P.3d 846 (2010) ("It is impossible to substantially comply with a statutory time limit. It is either complied with or it is not."). Hoquiam could have timely asked the County to bring a mandate action to undo the plat maps pursuant to RCW 58.17.190. Hoquiam could have also timely appealed its own application of the assessment lien.

Hoquiam was not a necessary party to this action because it had no right to judicially collaterally attack the final application of its own assessment lien and the Superior Court could not confer such a right upon the City. *C.f., Freestone Capital Partners, LP v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 670, 230 P.3d 525 (2010). RCW 58.17.190; RCW 36.70C.030-.040. Hoquiam's success in convincing the Assessor to unconstitutionally provide relief beyond that which the legislature has afforded does not require or authorize a Superior Court to entertain a collateral attack by Hoquiam on its own assessment lien under the Superior Court's original jurisdiction where the Constitution required Hoquiam to timely invoke the Superior Court's appellate jurisdiction to obtain such review. Const., Art IV, § 6; RCW 58.17.190; RCW 36.70C.030-.040; *Davis*, 159, at 441-3; *Conom v. Snohomish County*, supra. The County and City cannot by conspiring together add or subtract to the Superior Court's appellate jurisdiction, which is appellate "as prescribed by law". Const., Art. IV, § 6.

However, to the extent this Court holds Hoquiam is a necessary party, then this appeal must be remanded to the Superior Court so that Hoquiam can participate in this litigation as it continues on. *Henry*, 30 Wn. App. at 256; *Treyz v. Pierce County*, 118 Wn. App. 458, 464, 76 P.3d 2003 (2003).

**CONCLUSION**

This Court should reverse the summary judgment in favor of the County and specify to the trial court the law which should be applied to these facts.

Respectfully Submitted this 3<sup>rd</sup> day of August, 2011, at Arlington, WA.



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Scott E. Staffie  
WSBA No. 6964

No. 41298-5-II

COURT OF APPEALS DIVISION TWO  
OF THE STATE OF WASHINGTON

---

JOHN R. WYSS  
Plaintiff/Appellant

vs.

GRAYS HARBOR COUNTY, RESPONDENT

Defendant/Appellee

---

APPEAL FROM SUPERIOR COURT  
FOR THURSTON COUNTY

---

**APPELLANT'S APPENDIX 1-3 TO APPELLANT'S REPLY BRIEF**

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Scott E. Stafne, WSBA # 6964  
Andrew J. Krawczyk, WSBA #42982  
Attorneys for Appellant

Stafne Law Firm  
239 N. Olympic Avenue  
Arlington, WA 98223  
Phone: 360-403-8700  
Fax: 360-386-4005

 ORIGINAL

# APPENDIX 1

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

JOHN R. WYSS,

Appellant,

v.

GRAYS HARBOR COUNTY,

Respondent.

No.: 41298-5-II

**RESPONDENT'S MOTION ON THE  
MERITS**

**I. IDENTITY OF MOVING PARTY.**

The respondent, Grays Harbor County (hereafter, "the County"), asks for the relief as designated in Part II.

**II. STATEMENT OF RELIEF SOUGHT.**

The County requests that the Court of Appeals, Division II, grant its request as set forth in this Motion on the Merits and affirm the decision of the Superior Court for Thurston County, pursuant to RAP 18.14(e)(1). Further, the County requests that this court dismiss the appeal as set out in Section IV herein below and grant this motion.

**III. FACTS RELEVANT TO THE MOTION.**

The facts in this litigation date back to 1999, when the Respondent, John R. Wyss, attempted to subdivide his real property lot in the City of Hoquiam, Washington ("the City"),

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4 during the process of the City's administrative nuisance abatement against the property. In  
5 August 1999, the City condemned Wyss' eight-unit apartment building at 314 Lincoln Street  
6 because it was found to be dangerous under provisions of the 1997 Uniform Code For The  
7 Abatement of Dangerous Buildings. Wyss' 314 Lincoln Street parcel is located entirely within  
8 the City. (CP 26-29, 31, 38-39, 53, 113-114.)<sup>1</sup>

9 On September 21, 1999, Wyss executed and recorded in the County Auditor's office a  
10 quitclaim deed transferring the north 40 feet of his 84-foot lot to his minor son, James. (CP 53,  
11 136.) Wyss intended to retain ownership of the portion of the property on which the building  
12 stood. The County Assessor, upon receiving Wyss' recorded quitclaim deed, assigned a new tax  
13 parcel number (053800800703) for the north 40-foot portion of the property. (CP 59.) However,  
14 Wyss failed to comply with the City's regulations on subdivisions of real property when he  
15 divided his property by means of the September 21, 1999 quitclaim deed. (CP 7, 56.) After  
16 Wyss exhausted his administrative appeals of the City's abatement order, the City subsequently  
17 assessed an abatement lien on this property in the amount of \$25,988.00, providing notice of the  
18 lien to the County. (CP 61, 67, 180.)

19 In response to the City's Building Code Council decision, Wyss filed a petition for review  
20 in Grays Harbor County Superior Court, but the court dismissed his appeal as untimely. (CP 10,  
21 12.) He appealed to the Court of Appeals, who affirmed the superior court's dismissal order in an  
22 unpublished opinion. (CP 31-34.) Wyss then sought relief in federal court where the U.S.  
23 District Court denied relief and dismissed his claims, ruling that Wyss was accorded due process

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25 <sup>1</sup>The facts in the present case were the subject of two previous lawsuits involving Mr.  
26 Wyss and the City in state court. The first case culminated in the Court of Appeals' unpublished  
27 opinion in *John R. Wyss v. City of Hoquiam* (No. 25907-9-II, April 5, 2002), appearing in the  
record below at CP 31-34, and the second case culminated in the Court of Appeals' unpublished  
opinion in *City of Hoquiam v. John R. Wyss* (No. 34048-8-II, December 5, 2006), appearing in  
the record below at CP 53-58.

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4 and that his Fifth Amendment taking claim had no merit because the building was a nuisance and  
5 the City was properly exercising its police power to protect and ensure public safety. The federal  
6 court ruling was affirmed on appeal. (CP 37-47, 49-51.)

7 On July 7, 2004, the City brought suit in Grays Harbor County Superior Court and  
8 obtained an October 17, 2005 summary judgment ruling declaring that the purported land transfer  
9 under the September 21, 1999 quitclaim deed to James was unlawful, invalid and void. (CP 6-8,  
10 64-66, 141-43.) Wyss' counterclaim for inverse condemnation was rejected. *Id.* The trial court  
11 summary judgment invalidating the quitclaim deed and its attempted subdivision was affirmed  
12 by the Court of Appeals in an unpublished opinion. (CP 53-58.) The Court of Appeals ruled,  
13 *inter alia*, that the short subdivision Wyss attempted to transfer by quitclaim deed was not  
14 created legally, and the transfer was illegal and in violation of RCW 58.17.030 and Chapter 9.34  
15 of the Hoquiam Municipal Code ("HMC"). (CP 56.)

16 The County was not immediately made aware of the superior court's October 17, 2005  
17 invalidation of the September 21, 1999 quitclaim deed. By letter dated March 11, 2009, the City  
18 notified the County Assessor of the superior court judgment invalidating Wyss' purported  
19 subdivision by quitclaim deed. (CP 59-61.) Upon receiving this information, the Assessor  
20 cancelled tax parcel number 053800800703 and listed the plaintiff's property as a single lot  
21 under the original tax parcel number 053800800702. (CP 60.) ADD

22 In spite of the October 17, 2005 summary judgment order, affirmed on appeal, ruling that  
23 the September 21, 1999 quitclaim deed from Wyss to James was illegal and in violation of City  
24 subdivision regulations, Wyss filed the present action below on February 19, 2010. In this  
25 action, Wyss yet again alleges that his purported two-lot "subdivision" remains valid and Grays  
26 Harbor County somehow improperly "assessed an abatement lien against Plaintiff's second lot in  
27 2009." (CP 72, 86.) Without citing any legal authority in support, Wyss asserts that the County

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4 Assessor's action in merely assigning tax parcel numbers upon receipt of the later-invalidated  
5 quitclaim deed, constituted a "land use action" for purposes of the Land Use Petition Act  
6 ("LUPA"), Chapter 36.70C RCW. *Appellant's Opening Brief*, 12-15.

7 The County filed a motion for summary judgment in the trial court below asking the court  
8 to dismiss Wyss' declaratory judgment action on the basis that the Assessor's assignment of a tax  
9 parcel number pursuant to RCW 84.40.160 is not a land use decision, that Wyss failed to state a  
10 claim upon which relief may be granted, and that Wyss is barred by the doctrine of *res judicata*  
11 from attacking the Grays Harbor County Superior Court's 2005 summary judgment holding that  
12 Wyss' attempted subdivision by quitclaim deed is void in violation of the Hoquiam Municipal  
13 Code and RCW 58.17. (CP 73.) On September 17, 2010, the Thurston County Superior Court  
14 agreed with the County's position and dismissed this action below. The trial court found that  
15 Wyss was collaterally estopped from attacking the 2005 superior court order. (CP 206-209.)  
16 This appeal followed. (CP 210.)

17  
18 **IV. GROUNDS FOR RELIEF AND ARGUMENT.**

19 The County requests the court grant this Motion on the Merits to affirm the trial court's  
20 order granting summary judgment of dismissal below. The basis for this request is that issues  
21 presented for review by this court in this appeal are clearly controlled by settled law, are factual  
22 and supported by the evidence, and there is no genuine issue of material fact in dispute. RAP  
23 18.14(e)(1). Further, the Assignments of Error in this case are frivolous and without merit,  
24 having no basis in fact nor warranted by law, and the court should sanction the appellant and his  
25 counsel by ordering payment of the County's attorney fees and costs on appeal under RAP  
26 18.9(a).

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5 **A. Wyss improperly collaterally attacks the 2005 superior court judgment  
invalidating Wyss' attempted subdivision.**

6 Wyss attempts to redraft the issues below to assert that the County somehow attempts to  
7 collaterally attack his admittedly illegal 1999 subdivision based on the 2005 Grays Harbor  
8 County Superior Court summary judgment decision invalidating his quitclaim deed. *Appellant's*  
9 *Opening Brief*, 2. Wyss then proceeds to collaterally attack the jurisdiction of the Grays Harbor  
10 County Superior Court (and consequently the Court of Appeals decision affirming the trial court)  
11 several years after the mandate in that case was issued. Wyss' claims in this appeal are based on  
12 three false assumptions not briefed by appellant and unsupported in the record below or under  
13 Washington law: (1) that the County has land use jurisdiction over lands situated within an  
14 incorporated city limits, (2) that the County Assessor's<sup>2</sup> assignment of tax parcel numbers  
15 constitutes a "land use decision" under RCW 36.70C.020 (2), and (2) that the 2005 decision of  
16 the Grays Harbor County Superior Court failed to "rescind" Wyss' illegal subdivision, leaving it  
17 in place.<sup>3</sup> (CP 3, 9.) Each false assumption will be discussed below.

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20 \_\_\_\_\_  
21 <sup>2</sup>Wyss refers to the Auditor several times in his opening brief, but fails to explain what  
22 action the Auditor took that he claims is a "land use decision." The County believes Wyss  
23 intended to refer to the Assessor since the only involvement by the Auditor was to simply record  
24 the September 21, 1999 quitclaim deed at Wyss' behest, prior to the superior court order in 2005  
invalidating it. Mr. Wyss' real assertion is that the Assessor somehow "rescinded" his attempted  
1999 subdivision by changing tax parcel numbers for the property. *Appellant's Opening Brief*,  
12.

25 <sup>3</sup>Wyss makes these same legally and factually unsupported assumptions that his attempted  
26 subdivision by quitclaim deed in 1999 was "illegal, but valid" in his pending appeal before this  
27 Court of the judgment and order of sale in tax foreclosure proceedings in *Wyss v. Grays Harbor*  
*County*, No. 41691-3-II, filed January 13, 2011. *See, Appellant's Response to Motion to Dismiss*,  
dated March 28, 2011, in that appeal.

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5           **1.     Assignment of tax parcel numbers by a county assessor is not a “land use decision” under RCW 36.70C.020(2).**

6           The first false assumption made by Wyss in this appeal is that the action by the County  
7 Assessor in assigning two tax parcel numbers to two “lots” illegally created by Wyss’ quitclaim  
8 deed is a land use decision for purposes of LUPA. *Appellant’s Opening Brief*, 5. In fact, Wyss  
9 fails to present even a cursory analysis of whether the Assessor’s action in simply assigning a  
10 new tax parcel number constitutes a land use decision under LUPA - he merely assumes that is  
11 the case. From this incorrect and unsupportable assumption, Wyss leaps to the flawed  
12 conclusion that, contrary to the prior 2005 superior court ruling voiding his attempted illegal  
13 subdivision by the 1999 quitclaim deed, “the two-lot subdivision remains viable” because no  
14 LUPA appeal was filed by either the City or the County. *Appellant’s Opening Brief*, 24.

15           But neither Wyss’ court-invalidated September 21, 1999 quitclaim deed, nor the County  
16 Assessor’s assigning separate tax parcel numbers in reliance on Wyss’ invalid deed constitute a  
17 land use decision under LUPA.<sup>4</sup> A “land use decision” is defined by RCW 36.70C.020 (2) to  
18 mean:

19                     ...a final determination by a local jurisdiction's body or officer with the highest  
20                     level of authority to make the determination, including those with authority to  
21                     hear appeals, on:

22  
23           <sup>4</sup>Although not clearly argued in his opening brief, the fact that the County Auditor  
24 recorded the 1999 quitclaim deed at Wyss’ request does not constitute a subdivision of property  
25 by the Auditor (or County) under chapter 58.17 RCW. The County Auditor is simply required to  
26 record deeds upon payment of fees specified by RCW 36.18.010. RCW 65.04.030 requires the  
27 Auditor to record deeds upon payment of prescribed fees, which is a nondiscretionary ministerial  
action not involving “an application for a project permit or other governmental approval required  
by law,” an “interpretative or declaratory decision,” or “enforcement by a local jurisdiction of  
ordinances regulating the improvement, development, modification, maintenance, or use of real  
property.”

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4 (a) An application for a project permit or other governmental approval required by  
5 law before real property may be improved, developed, modified, sold, transferred,   
6 or used, but excluding applications for permits or approvals to use, vacate, or  
transfer streets, parks, and similar types of public property; excluding applications  
for legislative approvals such as area-wide rezones and annexations; and  
excluding applications for business licenses;

7 (b) An interpretative or declaratory decision regarding the application to a specific  
8 property of zoning or other ordinances or rules regulating the improvement,  
development, modification, maintenance, or use of real property; and

9 (c) The enforcement by a local jurisdiction of ordinances regulating the  
10 improvement, development, modification, maintenance, or use of real property.   
11 However, when a local jurisdiction is required by law to enforce the ordinances in  
a court of limited jurisdiction, a petition may not be brought under this chapter.

12 Wyss fails to cite any legal authority, and the County has found none, standing for the  
13 proposition that when a County Assessor assigns real property tax parcel numbers, he or she is  
14 making a *land use decision* under RCW 36.70C.020 (2) or for any subdivision purpose under  
15 RCW 58.17. The Assessor's assignment of tax parcel numbers is simply a manner of listing real  
16 property required by RCW 84.40.160, which provides in relevant part:

17 ...That the assessor shall give to each tract of land where described  
18 by metes and bounds a number, to be designated as Tax No. . . . , which  
19 said number shall be placed on the tax rolls to indicate that certain piece of  
20 real property bearing such number, and described by metes and bounds in  
the plat and description book herein mentioned, and it shall not be  
necessary to enter a description by metes and bounds on the tax roll of the  
county, and the assessor's plat and description book shall be kept as a part  
of the tax collector's records . . .

21 RCW 84.40.160 mandates assignment of tax parcel numbers by the Assessor only  
22 as a means of listing real property, not for land development or subdivision creation,  
23 which is governed by RCW 58.17 and, in this case, by HMC Title 9.<sup>5</sup> (CP 15-24.)  
24

25 <sup>5</sup>Wyss also erroneously cites RCW 58.17.190 for his theory that the County is required to  
26 seek a writ of mandate to "reverse its mistake" (apparently by the auditor's action in accepting  
the 1999 deed for recording). *Appellant's Opening Brief*, 21-22. But this statute applies to the  
27 auditor's acceptance of "*any plat for filing*" and makes no mention of recording deeds. As  
discussed further in this motion, neither the auditor's recording the deed under RCW 65.04.030

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4 Chapter 84.40 is a *taxation* chapter, not a land use or subdivision chapter, and the  
5 assignment or cancellation of tax parcel numbers under RCW 84.40.160 is not a land use  
6 decision subject to LUPA. The County has found no reported Washington case or  
7 statutory authority recognizing any county assessor authority to make *land use*  
8 *determinations* as defined by RCW 36.70C.020(2), or by assignment of tax parcel  
9 numbers under RCW 84.40.160.

10 Further, Wyss fails to point to any evidence in the record controverting the  
11 Assessor's statement that "[t]he Assessor's office does not approve or establish real  
12 property subdivisions within incorporated or unincorporated areas of the County." (CP  
13 59.)

14 Consistent with the Assessor's inability to make a land use decision by simply  
15 assigning tax parcel numbers in response to Wyss' 1999 quitclaim deed submission,  
16 neither could or did the Assessor "rescind" any subdivision by combining tax parcel  
17 numbers in response to the superior court summary judgment order of October 17, 2005.  
18 The appellant simply *assumes* the Assessor made a land use decision, but does not and  
19 cannot provide any supporting legal authority for this assertion.

20 The appellant cites several reported decisions supporting "Washington's  
21 longstanding policy favoring the finality of land use decisions." *See, e.g., Thurston*  
22 *County v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 329,  
23 190 P.3d 38 (2008); *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.2d 25 (2007);  
24 *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002); *Washington Sportsmen's*  
25 *Association v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000). *Appellant's Opening*

26  
27 nor the assessor's assignment of tax parcel numbers based upon the invalid 1999 deed constitute  
a "land use decision." In both situations, RCW 58.17.190 has no application to this case.

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4 *Brief*, 15. None of the foregoing decisions cited by the appellant involve or address a  
5 county assessor's responsibility to assign tax parcel numbers under RCW 84.40.160 and  
6 none of the cited cases stand for the proposition that a county assessor has any land use  
7 decision authority, whether over lands inside or outside incorporated areas.

8 There is no recognized Washington legal authority (or from any other jurisdiction  
9 the County can find) holding that assignment of tax parcel numbers by a local assessor  
10 constitutes "a land use action."

11  
12 **2. The County has no legal authority to issue a land use decision**  
13 **over Wyss' real property located within the corporate limits of**  
14 **the City of Hoquiam.**

15 A second fatal flaw in the appellant's appeal lies in the fact that the County has no  
16 legal authority to issue any land use decisions concerning real property located within the  
17 corporate boundaries of the City. Without citing any supporting legal authority, which  
18 the County contends does not exist, holding that a county can legally make any land use  
19 determination on property located *within incorporated city limits*, Wyss' assertion in this  
20 appeal that the County made any such a land use decision with respect to his 314 Lincoln  
21 Street property is frivolous since such argument is not well grounded in fact nor  
22 warranted by law.

23 Under LUPA, the definition of local jurisdiction "only includes "a county, city, or  
24 incorporated town." *Samuel's Furniture, Inc. v. Ecology*, 147 Wn.2d 440, 453, 54 P.3d  
25 1194 (2002), at Footnote 12, citing RCW 36.70C.020(2). "The 'local jurisdiction's body  
26 or officer with the highest level of authority to make the determination' necessarily refers  
27 to that person or agency within a local jurisdiction . . . which may have review authority  
over the local jurisdiction's decisions." *Id.* The local jurisdiction's officer authorized to

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4 “approve, approve with conditions, or deny short subdivision application[s]” concerning  
5 real property located within the City of Hoquiam is the City Engineer. HMC 9.07.070  
6 (1); CP 18. The City Council has the highest level of authority to review the City  
7 Engineer’s decision on a short subdivision application in Hoquiam. HMC 9.07.080; CP  
8 18.

9 Clearly and incontrovertibly, the County cannot issue short subdivision approvals  
10 on real property lying within the City. Similarly, the County (including its officers,  
11 whether they include the Assessor or Auditor) has no authority what so ever to  
12 administratively review land use decisions involving subdivisions of land within the City  
13 of Hoquiam. For this reason alone, there is no merit in law or fact to Wyss’ claims that  
14 the County issued any land use decision relating to his 314 Lincoln Street property.  
15 Indeed, Wyss fails to even address this issue in his opening brief.

16  
17 **B. The 2005 decision of the Grays Harbor County Superior Court**  
18 **properly invalidated and “rescinded” Wyss’ purported two-lot**  
19 **subdivision by quitclaim deed.**

20 Yet another false and misleading assertion by the appellant is that “neither the  
21 decision of the Superior Court nor . . . [the Court of Appeals] explicitly states that it is  
22 rescinding the illegal subdivision which Wyss created on September 21, 1999 . . . ”  
23 *Appellant’s Opening Brief*, 9. Wyss’ argument in this respect appears to be a matter of  
24 word-play in an attempt to avoid the clear result of the earlier 2005 superior court  
25 judgment; the Grays Harbor County Superior Court effectively *voided and rescinded* the  
26 September 21, 1999 quitclaim deed from Wyss to his son James in stating as follows:

27 The Court hereby enters and grants Declaratory Judgment that the  
purported transfer of a portion of the property located at 314 Lincoln  
Street, Hoquiam, Washington, to wit: the Northerly 40 feet of the

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4 Southerly 84 feet of Lots 7 and 8, Karr's Hill Addition to the City of  
5 Hoquiam, by quitclaim deed dated September 21, 1999, *is enjoined,*  
6 *declared unlawful and invalid,* and the Defendants are barred and enjoined  
7 from attempting to transfer a portion of said property without first  
8 complying with Title 9 of the Hoquiam Municipal Code.

9 [Emphasis added.] (CP 65, 142.)

10 To "rescind" is to "make void (as an act) by action of the enacting authority or a  
11 superior authority.<sup>6</sup> The terms "invalid" and "void" are synonymous with "rescind."<sup>7</sup> No  
12 reasonable reading of the superior court's summary judgment order of October 17, 2005,  
13 can reach any other conclusion but that the 1999 quitclaim deed is invalidated, voided  
14 and rescinded by the court. This Court also ruled in Wyss' appeal of the 2005 trial court  
15 judgment that "the transfer was illegal." (CP 56.) In determining that the quitclaim deed  
16 was illegal and invalid, the trial court necessarily rescinded it. The fact that the trial court  
17 did not use the term "rescinds" is of no moment.

18 Despite the absence of any jurisdiction by the County or any of its officers to  
19 make land use determinations on property situated within the City of Hoquiam, Wyss  
20 claims that a letter he received from a deputy county treasurer purports to show that the  
21 County "rescinded" his 1999 subdivision. *Appellant's Opening Brief*, 11-12. The April  
22 10, 2009 letter by Debra Mattson of the County Treasurer's office (CP 162), while  
23 inartfully worded, does not constitute or confirm any land use determination that Wyss'  
24 invalidated subdivision is legally valid. Mattson later acknowledged this inaccuracy in  
25 her letter, confirming that "... neither the Treasurer, nor the County approves or

26 <sup>6</sup>*Merriam-Webster Online, <http://www.merriam-webster.com/dictionary/rescind>*

27 <sup>7</sup>*Merriam-Webster Online, <http://www.merriam-webster.com/dictionary/rescind>,  
(Thesaurus).*

Handwritten notes in the right margin: "only go to Wyss not to the County" and "to".

1  
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3  
4 disapproves any subdivisions or other land uses occurring within the incorporated limits  
5 of the City . . . ” (CP 68.) Just as the County cannot approve or review subdivisions or  
6 any other land use decision on land lying within the City, neither can it “rescind” nor take  
7 any other action to invalidate land use decisions on property lying with the City.

8  
9 **C. The appellant’s appeal is frivolous and the County should be awarded  
its attorney fees and costs under RAP 18.9.**

10 The County seeks attorney fees and costs for a frivolous appeal under RAP 18.9

11 (a). This rule permits this court, on its own motion or that of a party, to require a party to  
12 pay the fees of another party for defending a frivolous appeal. *Fay v. NW. Airlines, Inc.*,  
13 115 Wn.2d 194, 200-01, 796 P.2d 412 (1990). Pursuing a frivolous appeal justifies the  
14 imposition of terms and compensatory damages. *Green River Community College*  
15 *District No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 442-43, 730 P.2d 653 (1986)  
16 (quoting *Boyles v. Department of Retirement Systems*, 105 Wn.2d 499, 509, 716 P.2d 869  
17 (1983) (Utter, J., concurring in part, dissenting in part)); *Pearson v. Schubach*, 52  
18 Wn.App. 716, 725-26, 763 P.2d 834 (1988).

19 An appeal is frivolous if there are no debatable issues upon which reasonable  
20 minds might differ and it is so totally devoid of merit that there was no reasonable  
21 possibility of reversal. *Green River*, 107 Wn.2d at 442-43, 730 P.2d 653 (quoting *Boyles*,  
22 105 Wn.2d at 509, 716 P.2d 869 (Utter, J., concurring in part, dissenting in part)).  
23 *Eugster v. City of Spokane* 139 Wn.App. 21, 34, 156 P.3d 912, 919 (2007). All doubts  
24 are resolved in favor of the appellant. *Lutz Tile, Inc. v. Krech*, 136 Wn.App. 899, 906,  
25 151 P.3d 219 (2007), *review denied*, 162 Wn.2d 1009, 175 P.3d 1092 (2008).

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3  
4 “Appropriate sanctions may include, as compensatory damages, an award of  
5 attorney fees and costs to the opposing party.” *Kinney v. Cook*, 150 Wn.App. 187, 195,  
6 208 P.3d 1 (2009), citing *Yurtis v. Phipps*, 143 Wn.App. 680, 696, 181 P.3d 849 (citing  
7 *Rhinehart v. Seattle Times, Inc.*, 59 Wn.App. 332, 342, 798 P.2d 1155 (1990)), *review*  
8 *denied*, 164 Wn.2d 1037, 197 P.3d 1186 (2008).

9 In the present appeal, Wyss simply ignores the invalidity of his 1999 deed  
10 previously litigated and established on two previous occasions by the Grays Harbor  
11 County Superior Court and U.S. District Court and upheld on appeal in each instance.  
12 Wyss has had multiple previous opportunities for judicial review and has been  
13 unsuccessful on the very same claims asserted in this appeal. Yet he raises no debatable  
14 issues upon which reasonable minds might differ and utilizes assumptions not based in  
15 law or fact. He fails to even address the County’s clear lack of land use jurisdiction over  
16 City lands by asserting the County “approved” or “rescinded” a subdivision of land *lying*  
17 *solely within the corporate limits of the City of Hoquiam*. Using this phantom  
18 assumption of jurisdiction, he again fails to provide any legal authority or cogent  
19 argument supporting his novel assertion that the Assessor made a land use decision for  
20 purposes of LUPA in assigning tax parcel numbers to the property as mandated by RCW  
21 84.40.160, based upon receipt of the later-invalidated 1999 quitclaim deed.

22 It is unfair and costly to the County and wastes the Court's resources and scarce  
23 taxpayer funds in litigating frivolous appeals. Therefore the Court should sanction the  
24 appellant and his counsel in the amount of the County’s attorney fees and costs to defray  
25 the portion of the Court's costs expended on this appeal.  
26  
27

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4 **V. CONCLUSION.**

5 There is no "existing subdivision" relating to the 314 Lincoln Street property and  
6 no "land use decision" by the County, despite the unsupported assumptions by the  
7 appellant. Wyss' assignments of error and arguments without citation to any supporting  
8 Washington law, that the County Auditor and/or Assessor somehow made land use  
9 decisions regarding the 314 Lincoln Street property is not well grounded in fact nor  
10 warranted by law. The County asks that the Court grant its motion on the merits  
11 affirming the decision of the trial court below, dismissing this appeal and awarding the  
12 County its costs and attorney fees against appellant and his counsel for prosecuting a  
13 frivolous appeal under RAP 18.9.

14 DATED: this 4 day of April, 2011.

15 Respectfully Submitted,

16  
17 By   
18 JAMES G. BAKER  
19 Senior Deputy Prosecuting Attorney  
20 WSBA #12446  
21  
22  
23  
24  
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27

# APPENDIX 2



judgment invalidating the quit-claim deed. The Assessor cancelled the tax parcel number it had assigned to the purported portion and listed the entire parcel under the original tax parcel number. This had the effect of transferring some liens that had been recorded against the purported portion to be recorded against the entire parcel. Wyss sued Grays Harbor County, arguing that the Assessor's action was illegal. The trial court granted the County's motion for summary judgment.

Wyss appealed, arguing that the County had not followed the proper process in response to the invalidation of his quit-claim deed, so the trial court erred in granting summary judgment. The County filed a motion on the merits to affirm under RAP 18.14. This court grants a motion on the merits to affirm the trial court's decision if appeal from that decision is clearly without merit. RAP 18.14(e)(1). In making its determination, this court will consider all relevant factors, including whether the issues on review:

(a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency.

RAP 18.14(e)(1).

The issues that Wyss raises are legal, rather than factual, and do not involve the trial court's discretion. There is little published authority on those issues. Thus, the issues are not clearly controlled by settled law, so this court cannot say that the Wyss's appeal is clearly without merit.

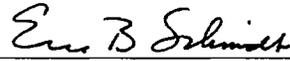
Accordingly, it is hereby

41298-5-II

ORDERED that the County's motion on the merits to affirm is denied. A panel of judges will consider the Wyss's appeal in due course. It is further

ORDERED that this appeal is linked for consideration with Wyss's pending appeal in No. 41691-3-II regarding the foreclosure of the liens discussed above.

DATED this 23<sup>rd</sup> day of June, 2011



---

Eric B. Schmidt  
Court Commissioner

cc: Scott E. Stafne  
Rebecca Thorley  
Andrew J. Krawczyk  
James G. Baker  
Jennifer Wieland

# APPENDIX 3

No. 41298-5-II

COURT OF APPEALS DIVISION TWO  
OF THE STATE OF WASHINGTON

---

JOHN R. WYSS  
Plaintiff/Appellant

vs.

GRAYS HARBOR COUNTY, RESPONDENT

Defendant/Appellee

---

APPEAL FROM SUPERIOR COURT  
FOR THURSTON COUNTY

---

**APPELLANT'S RESPONSE TO MOTION ON THE MERITS/ REPLY BRIEF**

---

Scott E. Stafne, WSBA # 6964  
Andrew J. Krawczyk, WSBA #42982  
Attorneys for Appellant

Stafne Law Firm  
239 N. Olympic Avenue  
Arlington, WA 98223  
Phone: 360-403-8700  
Fax: 360-386-4005

**FILE COPY**

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Instead of filing a response brief, Grays Harbor County (County) has filed a "Motion on the Merits (MOM). Wyss' counsel has been advised by staff from this Court that the MOM should be treated as if it were a Response Brief going to the merits of the appeal. Therefore, this is formatted as a Reply Brief.

### INTRODUCTION

Wyss and the County have vastly divergent ideas with regard to how land use law applies to this case. The County takes the position that by suing Wyss individually in 2005 to declare the invalidity of Wyss' transfer of part of his land to his son. *Hoquiam also obtained a ruling which required or authorized the County to informally change those plat maps and/or undo that subdivision which the County created in 1999.* Wyss disagrees.

In Wyss' declaration he identifies County plat maps at CP 138-139 in existence since 1999 which remained unchanged until the County altered them to eliminate one of the two lots. With regard to these plat maps, Wyss testified:

**A Plat Map**, published by Grays Harbor County and retrieved from the Assessor's web page in March 2010, which shows the parcels as they existed from 1999 until 2009. The parcel number of said parcel deeded to James Beamer-Wyss is #0503800800703, and has been described since 1999 by the Grays Harbor Assessor and treasurer as:

"KARRS HILL N 40' OF LOTS 7 AND 8, BLK 8"

The parcel number of the remainder retained by John Wyss is #053800800702, legally described since 1999 by the Grays Harbor Assessor and treasurer as:  
"KARRS HILL SLY 84' LS N. 40' OF LOTS 7 AND 8, BLK 8".  
CP 124:13-22.

Wyss testimony regarding the plat map was not disputed by the County in any way. Washington State law provides that the 1999 plats and the subdivision shown therein were valid since 1999. Further, that specific statutory procedures by the County and/or City were required to have been taken if Hoquiam or the County wanted to invalidate the parcel maps and/or subdivision. RCW 58.10.010, states:

All city or town plats or any addition or additions thereto, heretofore made and recorded in the county auditor's office of any county in Washington State, showing lots, ... shall be conclusive evidence of the location and size of the lots, ....

RCW 58.18.010 states:

In any county where an assessor has and maintains an adequate set of maps drawn from surveys at a scale of not less than two hundred feet to the inch, the assessor may with the permission of the county commissioners, file an assessor's plat of the area, *which when filed shall become the official plat for all legal purposes, ...*

RCW 58.17.190 states:

The county auditor shall refuse to accept any plat for filing until approval of the plat has been given by the appropriate legislative body. Should a plat or dedication be filed without such approval, the prosecuting attorney of the county in which the plat is filed shall apply for a writ of mandate in the name of and on behalf of the legislative body required to approve same, directing the auditor and

assessor to remove from their files or records the unapproved plat, or dedication of record.

RCW 58.17.212 sets forth specific procedures for vacating subdivisions.

**REPLY to "III. Facts Relevant to the Motion", MOM 1:25-4:17**

The County starts its MOM off with an unsubstantiated factual allegation: "... John R. Wyss attempted to subdivide his real property [in 1999] in the City of Hoquiam, ...". MOM p. 1:26-27. This is untrue. The facts show only that Wyss executed a quitclaim deed transferring approximately half of his land to his son. MOM 2:8-11; CP 53. The facts do not show Wyss took any steps to create a subdivision. MOM 2:13-15<sup>1</sup>. This is an important point because the illegal subdivision was created only as a consequence of the County officials' actions.

After the quitclaim deed was submitted, the County's plat maps reflected Wyss original lot, parcel no. 053800800702, as being composed of two lots: parcel No. 053800800702 and 053800800703. CP 123:16-124:22; 138; 139. The County drew up the plat map; Wyss had nothing to do with the creation of the County's map. Wyss paid basic taxes on both tax parcels; but did not pay any part of the assessment lien which

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<sup>1</sup> See *Hilao v Estate of Marcos*, 393 P.3d 987, 993 (9th Cir 2004) (A party is bound by the concessions made in its brief)

Hoquiam applied only to parcel No. 053800800702. CP 129:1-132:17; 183-195; 197-199.

Wyss objects to the statement at MOM 2:15-18 that after Wyss "exhausted his administrative appeals", the City subsequently assessed an abatement lien on "**this property**". The statement is deceptive for several reasons. First, administrative avenues of relief were exhausted in 1999. The judicial appeals challenging the abatement decision ended on April 5, 2002, with a determination that LUPA's 21 day limitations period applied to Wyss' appeal of Hoquiam's abatement decision. CP 31-34. Thereafter, Wyss brought an action based on 42 USC §1983 against Hoquiam in federal court alleging the abatement constituted an unconstitutional taking of property. Hoquiam counter claimed to nullify Wyss' transfer of property to his son. CP 37-47. The District Court granted summary judgment denying Wyss's §1983 claims against Hoquiam based on the doctrine of collateral estoppel. *Id.* The District Court held "... Mr. Wyss is collaterally estopped from re-litigating the fact that the City sent a copy of the Board's decision to the appropriate address on December 9, 1999 and this was found sufficient." CP 43.

The federal district court declined to hear Hoquiam's state law property claims against Wyss. CP 46:19-47:7. In this regard, the federal district Court stated:

8. Lastly, defendants ask the court to determine the legality of the transfer of property from Mr. Wyss to his minor son. Defendants specifically ask the court to declare the transfer void, to declare the transfer fraudulent, and to impose a fine on plaintiff pursuant to Hoquiam Code HMC 9.36.010.

As a matter of state property law, this court construes plaintiff's [sic] claims as a request for this court to exercise supplemental jurisdiction. However, when the causes(s) of action on which federal jurisdiction is based are dismissed from the case, it is within a district court's discretion to retain jurisdiction to adjudicate the pendent state law claims. [cite] CP 46:19-22. Further, it is generally preferable for a district court to remand remaining pendant claims to state court.

As discussed above, plaintiff's federal claims have been dismissed. Accordingly, this court declines to exercise supplemental jurisdiction over those remaining state law matters raised by defendants. CP 46:19-47:3.

The federal court's decision does not indicate Hoquiam ever requested that the two lot subdivision created by Grays Harbor County be dissolved or modified.

At MOM 3:7-15 the County discusses Hoquiam's suit against John Wyss "to invalidate Wyss' purported subdivision". Wyss objects to this characterization of the County's 2005 litigation. There is nothing in the record which suggests Hoquiam did anything other than bring a lawsuit against Wyss to invalidate the transfer of land to his son. This is not the equivalent under Washington law to bringing a lawsuit against the County to dissolve a subdivision or alter a plat map. *Cf. Grundy v. Thurston County*, 155 Wn.2d 1, 8, 117 P.3d 1089, 1092 (2005). One of the reasons

a lawsuit against Wyss is not the equivalent to bringing an appellate action in superior court challenging a local authority's land use decision or improperly created lots is that the legislature has enacted specific statutory procedures which govern review of such decisions. MOM, 9:22-24; *See also* RCW 36.70C.030 and 040; RCW 58.17.190 and 212. Moreover, under Washington's strong policy of finality for municipal land use decisions it is generally required that appellate actions to alter County land use decisions must be brought promptly and within applicable time limits. *See* RCW 36.70C.030 and 040. *See also Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.2d 25, 30 - 35, (2009); *Chelan County v. Nykreim*, 146 Wn. 2d 904, 52 P. 3d 1 (2002)<sup>2</sup>. Since any attack by the County of the creation of the 1999 Wyss subdivision in 2005 would have been untimely, the County would have been barred from even challenging the County's subdivision and/or creation of lots on Wyss' property. *Id.* Moreover, even

---

<sup>2</sup> In *Nykreim* at 146 Wn.2d pages 931 - 932 the Supreme Court stated with regard to the finality of land use decisions:

This court has also recognized a strong public policy supporting administrative finality in land use decisions. In fact, this court has stated that "[i]f there were not finality [in land use decisions], no owner of land would ever be safe in proceeding with development of his property. . . . To make an exception . . . would completely defeat the purpose and policy of the law in making a definite time limit." 146 Wn.2d at 931 and 932.

Following this policy of finality of land use decisions, this court in *Wenatchee Association [v. Chelan County]*, 141 Wn.2d 169, 4 P.3d 123 (2000)] held that an untimely petition under LUPA precluded collateral attack of the land use decision and rendered the improper approval valid.

if the County was not barred from challenging Wyss' subdivision, the County would have had to mount such a challenge as an appellant, and could not merely rescind a decade old land use decision. *City of Federal Way v. Town & Country Real Estate, LLC*, 39407-3-II (WACA)(April 5, 2011).

The City's motion for summary judgment in the 2005 case is set forth at CP 62--63. That motion clearly does not request the County or Wyss to invalidate the plat and/or subdivision. The most obvious reason Hoquiam did not request the platting and/or subdivision be vacated was because after the lots were platted by County officials they could be undone only by following specific procedures. *See e.g.* RCW 58.10.010; RCW 58.18.010; RCW 58.17.212; RCW 58.17.190. *See also* RCW Ch. 36.70C (Land Use Petition Act).

Just as Hoquiam's motion for summary judgment did not ask the County to vacate or dissolve the plat map and/or subdivision created in 1999, the order issued on October 17, 2005 did not purport to grant any such relief. CP 64-66.

In order to have fairly presented the facts to this Court the County should have explained that the reference to "*this*" property at MOM 2:15-18, i.e. the property to which the abatement lien was attached in **April, 2007**, was only parcel No. 053800800702 in the subdivision; **not parcel**

**No. 0453800800703 of the subdivision.** CP 124:3-132:13;138-140; 145-147; 151;156-7;159-160;162-66;175-176; 178; 180-182. At the time the City attached the abatement lien to only one of the parcels, both had different parcel numbers and legal descriptions. *Id.*

Hoquiam's application of the abatement lien to only one of the parcels on the platting map as it existed in 2007 is significant as it evidences Hoquiam's recognition of the subdivision *even after the Superior Court and this Court had voided Wyss' transfer of land to his son.* Because the County's brief is completely silent on this issue Wyss wants to reiterate **and make crystal clear** that the abatement lien Hoquiam applied in April, 2007 related to only parcel No. 053800800702 which was legally described as "KARRS HILL SLY 84' LS N. 40 ' OF LOTS 7 AND 8, BLK 8". CP 129:13-132:17; 183-199. As previously stated, parcel No. 053800800703 had an entirely separate legal description. *Id.* Once Hoquiam applied this abatement lien it had only 30 days in which to appeal its decision with regard to what real property the abatement assessment should have been attached. CP 151, § 906. Since Hoquiam did not file an appeal in May 2007, the lien applied to only lot to parcel No. 053800800702 which was legally described as "KARRS HILL SLY 84' LS N. 40 ' OF LOTS 7 AND 8, BLK 8". CP 129:13-132:17; 183-199.

The County makes light of the four years between the Superior Court's ruling voiding Wyss' transfer of land to his son in 2005 and the City Attorney's explanation to the Assessor that ruling invalidated the County's plat maps and/or subdivision map as it had existed from 1999.  
MOM 3:15-21.

The County was not immediately made aware of the superior court's October 17, 2005 invalidation of the September 21, 1999 quitclaim deed. By letter dated March 11, 2009, the City notified the County Assessor of the superior court decision invalidating Wyss' purported subdivision by quitclaim deed. (CP 59-61) Upon receiving this information, the Assessor cancelled parcel number 053800800703 (CP 60.)

Wyss takes strong exception to above "facts" as they really set forth a legal argument that the voiding of the transfer of Wyss' land to his son in 2005 constituted a retroactive voiding of the county plats which had existed since 1999.

The March 29, 2009 letter the City Attorney wrote to the County Assessor is informal, but clearly presents only an advocate's view that the superior court and this court *ordered the County to change the lots created by the County in 1999.*

Dear Ms. Rose-Konshu:

In 2007, the City of Hoquiam recorded on the assessment roll a lien for costs associated with the abatement of a dangerous building at 314 Lincoln, Hoquiam, Washington. The assessment was in the amount of \$25,988.00.

Apparently, the assessor's office still shows this property as being divided into two tax parcels. Mr. Wyss, the owner, had made an illegal subdivision of this property by quitclaiming a portion of his lot to his then 6 year old son. The City of Hoquiam was forced to file a lawsuit against Mr. Wyss to seek declaratory judgment that the transfer to his son was unlawful and invalid. On October 17, 2005, Judge Mark McCauley granted the City's Motion for Summary judgment, which among other things declared that the transfer was invalid.

Please find enclosed a copy of the City's motion for summary judgment, and a conformed copy of Judge McCauley's Order Granting Summary Judgment.

Thank you for your cooperation in this matter.

Sincerely yours,

Steven R. Johnson  
Hoquiam City Attorney (CP 61)

The County contends that the assessor's actions "in merely assigning parcel tax numbers upon receipt of the later invalidated quitclaim deed" did not constitute a land use action. MOM 3:21-4:6. But this misstates the facts and Wyss' contentions. In addition to providing a tax parcel number, the County created plat maps and an illegal subdivision based on Wyss quitclaim deed. *Cf.* CP 56 "A. Illegal Subdivision". Wyss did not give the County any plat map or go into the County and create it's Auditor's maps.

The County argues in its "facts" section that Wyss is barred by the doctrine of res judicata in challenging Hoquiam's failure to appeal its

assessment lien in 2007 as applying to only one lot in Wyss subdivision and the County's informal dissolution of that subdivision in 2009 so as to allow Hoquiam to foreclose on both lots. CP 4:7-16. This is obviously legal argument which Wyss does not accept as a "fact". It is Wyss' position that neither res judicata nor collateral estoppel is applicable to this appeal.

**REPLY to "A. Wyss improperly collaterally attacks the superior court judgment invalidating Wyss' attempted subdivision".**  
MOM, p 5.

Wyss' claims are entirely different than those brought in 2005. Strangely, the County does not define the elements of res judicata and/or collateral estoppel in its motion. MOM, p. 5. A case which applies res judicata is *Hayes v. Seattle*, 131 Wn.2d 706, 934 P.2d 1179 (1997). With regard to res judicata the Supreme Court states at page 712:

The purpose of the doctrine of res judicata is to ensure the finality of judgments. Under this doctrine, a subsequent action is barred when it is identical with a previous action in four respects: (1) same subject matter; (2) same cause of action; (3) same persons and parties; and (4) same quality of the persons for or against whom the claim is made.

In *Hayes* there was no dispute that factors three and four were met. That is not true here. This case does not involve the same parties. Hoquiam is not Grays Harbor County for purposes of platting and creating subdivisions. Indeed, the legislature has promulgated statutes as to what

must be done to vacate a plat map or subdivision that is created by County officials in violation of a city's subdivision laws. See RCW 58.17.190<sup>3</sup>; RCW 58.17.212. If Hoquiam wanted the County to vacate Wyss' recorded plats and/or lots and/or subdivision, as opposed to simply voiding Wyss' transfer of land to his son, Hoquiam was required to follow those appellate legal procedures the legislature devised to achieve such a result. Id. See also *James v. County of Kitsap*, 154 Wn.2d 574, 115 P.3d 286 (2005) (applying LUPA to impact fees related to a subdivision.); *Friends of Cedar Park Neighborhood v. City of Seattle*, 156 Wn.App. 633, 234 P.3d 214 (2010) (applying LUPA to challenge relating to subdivision.) Cf. *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002) (applying LUPA to a ministerial boundary line adjustment which, in effect, created a three lot short subdivision).

Simply asking the County to provide such a remedy more or less as a favor to Hoquiam in 2009 (a decade later) because the city attorney believed the superior court's 2005 order also applied to Gray Harbor County was not appropriate because Wyss is not, and never was, the

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<sup>3</sup> RCW 58.17.190 states:

The county auditor shall refuse to accept any plat for filing until approval of the plat has been given by the appropriate legislative body. ***Should a plat or dedication be filed without such approval, the prosecuting attorney of the county in which the plat is filed shall apply for a writ of mandate in the name of and on behalf of the legislative body required to approve same, directing the auditor and assessor to remove from their files or records the unapproved plat, or dedication of record.***

equivalent of the County, i.e. in other words "the same quality of the persons for and against whom the claim is made." *Grundy v. Thurston County*, 155 Wn.2d 1, 8, 117 P.3d 1089, 1092 (2005). Just as the Court noted in *Grundy* "Whether the county illegally issued an administrative shoreline exemption to the Bracks was not decided by the trial court, so it is not properly before us.", the question of whether the County created and should dissolve the illegal subdivision was not an issue before the Superior Court or this Court when it affirmed the ruling against Wyss.

If Hoquiam wanted the County to vacate the subdivision or dissolve the lots in 2009 it should have brought an action against the County. *Id.* Similarly, if Hoquiam had wanted to apply its 2007 abatement lien against all of Wyss' property it should have done so in the first instance pursuant to its own ordinances and/or LUPA and the jurisdictional limitations relating to each. *West v. Stahley*, 155 Wn.App. 691, 229 P.3d 943 (2010); *Nickum v. City of Bainbridge Island*, 153 Wn.App. 366, 223 P.3d 1172 (2009).

In *Hayes v. Seattle* the primary issues related to whether the lawsuit in question involved the "same subject matter" and "same cause of action" as that which was brought in the first suit. *See Hayes v. Seattle*, 131 Wn.2d 706, 934 P.2d 1179 (1997). The Court decided the two cases

were disparate even though they involved the same parties and related facts. *Id.* In this regard the Court observed the first

"... action for judicial review focused exclusively on the propriety of the decision making process of the Seattle City Council. On the other hand, the subsequent action was for a judgment for money to compensate Hayes for the damages he allegedly suffered as a result of the Council's action." *Id.* at 713.

Here all of Wyss' previous actions related to his untimely appeal of Hoquiam's abatement decision and then his federal cause of action under 42 USC §1983 for the destruction of his improvements. After the federal court dismissed Wyss' claims and refused to decide whether Wyss' deed to his son was void, the subsequent state court action brought by the County sought to enjoin and declare Wyss' transfer of land invalid and unlawful. This lawsuit involves entirely different complaints. The first relating to 2007 (when the City filed its abatement lien on only one lot) and the second occurring in 2009 when the city attorney convinced Grays Harbor County to dissolve one lot of the subdivision which had existed on the County's tax rolls since 1999. "Res judicata does not bar claims which arise out of a transaction separate and apart from the issue previously litigated." *Hayes*, 131 Wn.2d at 11.

Collateral estoppel is different than res judicata, but also promotes the policy of ending disputes by preventing the re-litigation of an issue or

determinative fact after the party estopped has had a full and fair opportunity to present a case. *See e.g. McDaniels v. Carlson*, 108 Wn.2d 299, 303, 738 P.2d 254 (1987); *Seattle-First Nat'l Bank v. Cannon*, 26 Wn.App. 922, 927, 615 P.2d 1316 (1980). Collateral estoppel requires:

(1) the issue decided in the prior adjudication be identical with the one presented in the action in question; (2) there is a final judgment on the merits in the first action; (3) The party against whom the plea is asserted be a party or in privity with a party to the prior adjudication; and (4) the application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

*See e.g. McDaniels v. Carlson*, 108 Wn.2d at 303 (1987). The burden of proof is on the party asserting estoppel. *Alaska Marine Trucking v. Carnation Co.*, 30 Wn.App. 144, 633 P.2d 105 (1981).

The issue which is being litigated in this appeal, i.e. the application of the abatement lien in 2007 on one lot only and the dissolution of lots by the County in 2009, had not taken place in 2005 and could not have been a subject of that litigation.

The City's failure to appeal the application of its abatement lien in 2007 is final and cannot be collaterally attacked. CP 151, §906; *West v. Stahley*, 155 Wn.App. 691, 229 P.3d 943 (2010); *Nickum v. City of Bainbridge Island*, 153 Wn.App. 366, 223 P.3d 1172 (2009). But that is precisely what is happening here without any due process at all. CP 159-167. By equating the judgment against Wyss as a judgment against the

County requiring the vacation of the subdivision, Hoquiam circumvents its responsibility to have timely appealed the application of its abatement lien in 2007. By informally modifying Wyss' subdivision, the County avoids having to follow any process relating to an appeal of the existing subdivision or creation of two lots on the County's plat maps. This harms Wyss by depriving him of the limitations period which would normally bar any collateral attacks on these decisions. This is because in Washington even illegal land use decisions "must be challenged in a timely, appropriate manner." *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 407, 120 P.3rd 56 (2005) (citing *Pierce v. King County*, 62 Wn.2d 324, 334, 382 P.2d 628 (1963)); *Stientjes Family Trust v. Thurston County*, 152 Wn.App. 616, note 8, 217 P.3d 379 (2009).

In summary, it is obvious the County chose not to discuss the criteria for res judicata and collateral estoppel in their MOM because those judicial doctrines do not even arguably apply to this case. This is an entirely different case than that which Hoquiam brought against Wyss in 2005. This case involves an entirely different defendant which has entirely different duties than does Hoquiam with regard to the issues raised here. Finally, this case is based on entirely different events -- events which had not even occurred until well after the 2005 litigation was resolved.

**REPLY to "1. Assignment of tax parcel numbers by a county assessor is not a land use decision under RCW 36.70C.020 (2)." MOM p. 6-9.**

Changes of tax parcel numbers are land use decisions because they are a modification. During this litigation the County has claimed that there was never an illegal subdivision created in 1999. That assertion is contrary to all the facts in the record. This Court stated in 2006: "Wyss' transfer of the north 40 feet effectively divided the property and created a short subdivision." CP 56. The City Attorney's letter to the County Assessor on March 11, 2009 stated: "Mr. Wyss, the owner, had made an illegal subdivision of this property by quitclaiming a portion of the lot to his then 6 year old son." CP 61. On April 10, 2009 in a response to a letter from Wyss (CP 159-160), Debra Mattson, an employee for the County stated:

In response to your letter inquiring why you received a corrected statement of the parcel listed above, I have enclosed a copy of the letter received from Grays Harbor County from the City of Hoquiam explaining the subdivision of the parcel had been deemed unlawful and invalid by Judge Mark McCauley." CP 162.

An examination of CP 156 - 159 and 180 - 181 makes clear the County took action in 2009 to change the County's plat map which had shown this property as two lots since 1999. As the County points out a "land use decision" under LUPA includes: "other governmental approval

required by law before real property may be ... modified...". MOM 6-7. All the evidence in the record shows the two lot plat map set forth at CP 138 & 139 was informally modified in 2009 so as to make one lot out of two. So regardless of whether you look at the beginning of the illegal subdivision in 1999 or at its end in 2009, there has been a governmental modification of real property which affects a 2007 un-appealed tax abatement proceeding which was based on the two lot subdivision existing at that time. A modification of land qualifies as a land use action. Similarly, the application of the assessment lien to only one of those lots in 2007 satisfied the criteria for being a land use decision pursuant to RCW 36.70C.020(2)(c). This part of LUPA's definition of land use decision applies to Hoquiam's enforcement of its own real property ordinances. CP 151; 154.

The County's second argument as to why LUPA cannot apply with regard to the County's modification of property in 1999 and 2009 is because the County, specifically the Auditor and the Assessor, had no power to create such lots. MOM 7:11-10:15. This is not true. The County clearly was given such authority by the legislature.

RCW 58.10.010, states in pertinent part:

All city or town plats or any addition or additions thereto, heretofore made and recorded in the county auditor's office of

any county in Washington state, showing lots, ... shall be conclusive evidence of the location and size of the lots, ....

RCW 58.18.010 states:

In any county where an assessor has and maintains an adequate set of maps drawn from surveys at a scale of not less than two hundred feet to the inch, the assessor may with the permission of the county commissioners, file an assessor's plat of the area, *which when filed shall become the official plat for all legal purposes, ...*

The County's assertion that RCW 58.17.190 does not apply to this case because Wyss only submitted a quitclaim deed is quickly dispensed with when one looks at the plat map which existed in the Grays Harbor County's auditor's office from 1999 - 2009. *See CP 124-137; 136-7.* Thus, the facts clearly show that the platted subdivision, which had not been approved by Grays Harbor, should have been challenged under RCW 58.17.190.

The prosecutor's argument that the only thing the County did was assign parcel numbers to accord with the quit claim deed Wyss filed is disingenuous and untrue. What went into the County from Wyss was a quitclaim deed. What came out was a map which platted Wyss' subdivision and taxed each lot separately. CP 138&139, 156-156-162; 183-198. The County's claim that RCW 65.04.030 required the Auditor to record Wyss's deed upon the payment of the proscribed fees", MOM p.6.,

n.1, is simply incorrect. That statute specifically couples that duty with the proviso:

" PROVIDED, That deeds, ... of real estate described by lot and block and addition or plat, *shall not be filed or recorded until the plat of such addition has been filed and made a matter of record.*" [Emphasis Supplied]

Notwithstanding there was no plat map the Auditor recorded the deed and someone in the County created a plat map establishing the two lot subdivision in violation of Hoquiam's ordinances. RCW 58.17.190 was on point and should have been followed.

**REPLY to "2. The County has no legal authority to issue a land use decision over Wyss' real property located within the corporate limits of the City of Hoquiam."**

RCW 58.17.190 empowers the county to make land use decisions in the City of Hoquiam. The County cites only Hoquiam ordinances in this section, where it claims the County has no power to create subdivisions and presumably dissolve lots. Of course, to the extent Hoquiam's ordinances are inconsistent with Washington statutory law, state law controls. Const. Art XI, Sec. 11. Research indicates that only one appellate case exists with regard to RCW 36.22, the statute relating to county auditors. The only relevance that case, *Smith v. Board of Walla Walla County*, 48 Wash. App. 303, 738 P.2d 1076 (1987), has here is to illustrate that the paucity of appellate case law regarding the interplay

between county powers was a matter of sufficient public importance to cause Division 3 to decide an appeal that was moot.

RCW Chapter 36.21 relating to County Assessor's powers has not often been interpreted by appellate courts either. Those cases in which this statute Chapter is cited are: *See e.g. Smith v. Spokane County*, 836 P.2d 854, 67 Wn.App. 478 (1992) (Taxpayer not responsible for notifying County regarding building permit); *Fifteen-O-One Fourth Avenue Limited v. Washington*, 49 Wn.App. 300, 742 P.2d 747 (1987) (Upholding new construction statute); *Washington v. Kinnear*, 80 Wn. 2d 400, 401, 494 P.2d 1362 (1972) (RCW Chapter 36.21 cited for proposition that "[p]roperty in this state is appraised for tax purposes by the county assessors"); *Telford v. Thurston County Board of Commissioners*, 95 Wn.App. 149, n.19, 974 P.2d 886 (1999) (RCW 36.21.011 cited for proposition "state department of personnel to consult with WSAC in maintaining classification and salary plan for assessors' employees"); *Advanced Silicon Materials, L.L.C. v. Grant County*, 124 P.3d 294, 156 Wn.2d 84 (2005) (RCW Chapter 36.21 cited by dissent)

The case law places the burden of mistakes on the County Assessor and County Auditor. *See Smith v. Spokane County*, 836 P.2d 854, 67 Wash. App. 478 (1992) (Taxpayer not responsible for notifying

County regarding building permit and consequent failure of County to collect taxes which would have been owed.).

Statutes we have already discussed indicate the legislature has made the County the final arbiter of lots, even within cities. *See e.g.* RCW 58.10.010; RCW 58.18.010; RCW 58.17.190. If the Counties were not intended by the legislature to have such power, why does RCW 58.17.190 provide a procedure for correcting mistakes should a plat be filed with a city's authority?

**REPLY to "B. The 2005 decision of the Grays Harbor County Superior Court properly invalidated and "rescinded" Wyss purported two lot subdivision by quitclaim deed." MOM, 10:17-12:7**

The County characterizes that Wyss' claim that "he is not the County and would not have the authority to rescind the County plat maps establishing two lots" is mere "word play". MOM 10:18-11:15. Wyss disagrees. If Hoquiam can bring an action against Wyss in 2005 and thereby invalidate a land use decision made in 1999 modifying his property, Washington's strong policy favoring the finality of land uses is at an end. Indeed, this Court's holding in 2006 that statutes of limitations do not apply to a city's action against individuals regarding land use transactions (CR 56-57) would eviscerate LUPA's jurisdictional limitation if it can be avoided by simply filing an action against an individual to void

a municipal land use decision. Certainly, this could not have been the result this Court intended in its unpublished decision.

This case is much like *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002), where a County official made a ministerial mistake and created a three lot subdivision when he granted a boundary line adjustment. Neighbors and the County sued the applicant and prevailed in the Superior Court and the Court of Appeals and obtained a ruling allowing the County to undo the ministerial mistake even though LUPA's 21 day limitation period had run. As we all know, the Supreme Court disagreed with the lower courts and required that even municipalities meet LUPA's limitations period if they want to challenge their own decision. If Hoquiam can wait 5 years and bring an original <sup>action</sup> against Wyss and thereby overturn a land use decision of the County then LUPA and other statutory provisions granting superior court only appellate jurisdiction and prescribing the judicial standards for review of land use decisions will be effectively overruled.

If the County's position is upheld LUPA's jurisdictional limitations period will not apply to ministerial decisions like those involved in *Nykreim*, even though by statute those decisions are to be ministerial determinations by the County. Moreover, the judicial branch will be able to overturn County land use decisions through their original jurisdiction of

cases to which the County was never a party; notwithstanding that the legislature has limited the subject matter jurisdiction to the superior court's appellate jurisdiction under Wash. Const. Art. IV; Sec. 6. *See e.g. Conom v. Snohomish County*, 155 Wn.2d 154, 157, 118 P.3d 344 (2005). *Query*: Does the superior court have subject matter jurisdiction to decide appeals through the exercise of original jurisdiction. The Court lacks the authority to give the superior court such power? *See Davis v. Washington State Dept. of Labor & Industries*, 159 Wn.App. 437, 441-3, 245 P.3d 253 (2011).

#### CONCLUSION

Hoquiam's MOM should be denied.

This Court should also reverse the summary judgment in favor of the County and declare that foreclosure cannot occur on both lots and enjoin any such foreclosure of both lots.

Respectfully submitted this 5<sup>th</sup> day of May, 2011.



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Scott E. Stafne, WSBA #6469



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Andrew J. Krawczyk, WSBA #42982

No. 41298-5-II

COURT OF APPEALS DIVISION TWO  
OF THE STATE OF WASHINGTON

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JOHN R. WYSS  
Plaintiff/Appellant

vs.

GRAYS HARBOR COUNTY,  
Defendant/Appellee

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APPEAL FROM SUPERIOR COURT  
FOR THURSTON COUNTY

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DECLARATION OF SERVICE

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I, Jennifer Robinson, declare under the penalty of perjury that I served a copy of Appellant's Reply Brief and Appellant's Appendix 1-3 To Appellant's Reply Brief on appellee's attorney by depositing a copy of these documents with the U.S. postal service addressed to James G. Baker, Senior Prosecuting Attorney, 102 W. Broadway, Room 102, Montesano, Washington, 98563.

Dated: August 3, 2011, at Arlington, Washington.

  
Jennifer Robinson

 ORIGINAL

11 2011-08 03 11:50  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
BY: [Signature]