

No. 41298-5-II

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

STATE OF WASHINGTON,
Respondent,

v.

JOHN R. WYSS,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR THURSTON COUNTY

THE HONORABLE WILLIAM T. McPHEE, JUDGE

BRIEF OF RESPONDENT

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I. INTRODUCTION AND COUNTER STATEMENT OF THE CASE

This case involves real property wholly located within the incorporated limits of the City of Hoquiam, Washington (hereafter “the City”). The property, located at 314 Lincoln Street in Hoquiam, formerly contained an eight-unit apartment building that was the subject of City administrative nuisance abatement proceedings in August 1999. The apartment building was subsequently condemned by the City because it was found to be dangerous under provisions of the 1997 Uniform Code for The Abatement of Dangerous Buildings. (CP 26-29, 31, 38-39, 53, 113-114.)¹

On September 21, 1999, Wyss executed and recorded in the Grays Harbor County (“the County”) Auditor’s office a quitclaim deed transferring the north 40 feet of his 84-foot lot to his minor son, James. (CP 53, 136.) Wyss intended to retain ownership of the portion of the

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 The first case culminated in the Court of Appeals’ unpublished opinion in *John R. Wyss v. City of Hoquiam* (No. 25907-9-II, April 5, 2002), appearing in the record below at CP 31-34, and the second case culminated in the Court of Appeals’ unpublished opinion in *City of Hoquiam v. John R. Wyss* (No. 34048-8-II, December 5, 2006), appearing in the record below at CP 53-58.

property on which the building stood. Upon being presented the recorded quit claim deed from Wyss, the Auditor's office assigned a new tax parcel number (053800800703) for the north 40-foot portion of the property. (CP 59.) Wyss' September 21, 1999 quitclaim deed dividing the 314 Lincoln Street property into two parcels failed to comply with the City's regulations on subdivisions of real property. (CP 7, 56.) After Wyss exhausted his administrative appeals of the City's abatement order, the City subsequently assessed an abatement lien on the 314 Lincoln Street property in 2007 in the amount of \$25,988.00, providing notice of the lien to the County. (CP 61, 67, 180.)

In response to the City's Building Code Council decision denying his administrative appeal, Wyss filed a petition for review in Grays Harbor County Superior Court, but the court dismissed his appeal as untimely. (CP 10, 12.) He appealed to the Court of Appeals, who affirmed the superior court's dismissal order in an unpublished opinion.² (CP 31-34.) Wyss then sought relief in federal court where the U.S. District Court denied relief and dismissed his claims, ruling that Wyss was accorded due process and that his Fifth Amendment taking claim had no merit because the building was a nuisance and the City was properly exercising its police

²*Wyss v. City of Hoquiam, City of Hoquiam Department of Public Works*, No. 25907-9-II (April 5, 2002), review denied, 147 Wn.2d 1025, 60 P.3d 93 (2002).

power to protect and ensure public safety. The federal court ruling was affirmed on appeal.³ (CP 37-47, 49-51.)

On July 7, 2004, the City brought suit in Grays Harbor County Superior Court and obtained an October 17, 2005, summary judgment ruling declaring that the purported land transfer under the September 21, 1999 quitclaim deed to James was unlawful, invalid and void. (CP 6-8, 64-66, 141-43.) Wyss' counterclaim for inverse condemnation was rejected. *Id.* The trial court summary judgment invalidating the quitclaim deed and its attempted subdivision was affirmed by the Court of Appeals in an unpublished opinion.⁴ (CP 53-58.) The Court of Appeals ruled, *inter alia*, that the short subdivision Wyss attempted to transfer by quitclaim deed was not created legally, and the transfer was illegal and in violation of RCW 58.17.030 and Chapter 9.34 of the Hoquiam Municipal Code ("HMC"). (CP 56.)

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 judgment invalidating Wyss' purported subdivision by quitclaim deed. (CP 59-61.) Upon receiving this information, the Assessor cancelled tax parcel number 053800800703 and

³*Wyss v. City of Hoquiam*, 111 Fed. Appx. 449, 2004 WL 1663511 (C.A.9, Wash.) (2004) (Unpublished).

⁴*City of Hoquiam v. Wyss*, No. 34048-8-II (December 5, 2006).

listed the plaintiff's property as a single lot under the original tax parcel number 053800800702. (CP 60.) This action was not taken at the direction of the City Attorney.

In spite of the October 17, 2005 summary judgment order, affirmed on appeal, ruling that the September 21, 1999 quitclaim deed from Wyss to James was illegal and in violation of City subdivision regulations, Wyss filed the present action below on February 19, 2010. In this action, Wyss yet again alleges that his purported two-lot "subdivision" remains valid and Grays Harbor County somehow improperly "assessed an abatement lien against Plaintiff's second lot in 2009." (CP 72, 86.) Without citing any legal authority in support, Wyss asserts that the County Assessor's action in merely assigning tax parcel numbers upon receipt of the later-invalidated quitclaim deed, constituted a "land use action" for purposes of the Land Use Petition Act ("LUPA"), Chapter 36.70C RCW. *Appellant's Opening Brief*, 12-15.

The County filed a motion for summary judgment in the trial court below asking the court to dismiss Wyss' declaratory judgment action on the basis that the Assessor's assignment of a tax parcel number pursuant to RCW 84.40.160 is not a land use decision, Wyss failed to state a claim upon which relief may be granted, and that Wyss is barred by the doctrine of *res judicata* from attacking the Grays Harbor County Superior Court's 2005 summary judgment holding that Wyss' attempted subdivision by

quitclaim deed is void in violation of the Hoquiam Municipal Code and RCW 58.17. (CP 73.) On September 17, 2010, the Thurston County Superior Court agreed with the County's position and dismissed this action below. The trial court found that Wyss was collaterally estopped from attacking the 2005 superior court order. (CP 206-209.) This appeal followed. (CP 210.) The County filed a motion on the merits to affirm under RAP 18.14, which was denied by Commissioner Schmidt on June 23, 2011.

The central dispute in this case involves whether the County Assessor's act of assigning tax parcel numbers constitutes a "land use decision" under chapter 36.70C, Washington's Land Use Petition Act ("LUPA"), and whether the County has any land use jurisdiction under LUPA over land wholly situated within an incorporated city.

II. COUNTER STATEMENT OF THE ISSUES PRESENTED.

- A. Whether the trial court's summary judgment should be affirmed on the basis that Wyss failed to join the City of Hoquiam as a necessary party to his declaratory judgment action under RCW 7.24.110?**
- B. Whether Wyss' complaint for declaratory judgment and injunctive relief below constitutes an improper collateral attack on the 2005 superior court judgment invalidating Wyss' 1999 quitclaim deed?**
- C. Whether the Auditor's assignment of tax parcel numbers to the 314 Lincoln Street property is a "land use decision" under RCW 36.70C.020(2).**

- D. **Whether Grays Harbor County has authority to issue a land use decision concerning property wholly situated within the corporate limits of the City of Hoquiam?**
- E. **Whether Wyss' repeated attempt in this appeal to collaterally attack the prior court decisions invalidating his 1999 quitclaim deed as an unlawful subdivision is frivolous, subjecting appellant to paying the County's attorney fees and costs under RAP 18.9?**

III. ARGUMENT.

- A. **The standard for review of the trial court decision is de novo.**

The trial court below granted the County's motion for summary judgment and dismissed appellant's complaint for declaratory and injunctive relief below. (CP 206-209.) On an appeal from a summary judgment, the Court of Appeals conducts the same review as the trial court. *Bainbridge Citizens United v. Washington State Department of Natural Resources*, 147 Wn. App. 365, 371, 198 P.3d 1033 (2008), citing *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). The standard for review of the trial court's summary judgment decision is de novo. *Id.* Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The Court of Appeals may also sustain a trial court's ruling on any correct ground, even if the trial court did not consider

it. *Bainbridge Citizen's United, supra*, citing *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

B. Wyss failed to join the City as a necessary party, requiring dismissal of his complaint.

Mr. Wyss filed his action below under the Uniform Declaratory Judgments Act, chapter 7.24 RCW, seeking to avoid the City's abatement lien on a portion of his 314 Lincoln Street property. (CP 100.)⁵ The City prosecuted its abatement action against Wyss' 314 Lincoln Street property as legally described prior to the subsequently-invalidated 1999 quitclaim deed: "[t]he Southerly 84 feet of Lots 7 and 8, Block 8, Karr's Hill Addition to the City of Hoquiam, records of Grays Harbor County, Situate in Grays Harbor County, State of Washington." (CP 26.) In 2007, the City "recorded on the assessment roll a lien for costs associated with the abatement of a dangerous building located at 314 Lincoln Street, Hoquiam, Washington," in the amount of \$25,988.00. (CP 61.) The City's abatement lien was placed on the County's assessment roll on April 20, 2009. (CP 67.)

Wyss did not join the City of Hoquiam as a party to his complaint for declaratory judgment below. RCW 7.24.110 provides in relevant part:

⁵The appellant's complaint for declaratory judgment and injunctive relief filed below does not appear to be part of the record for review. However, Wyss' briefing in response to the County's motion for summary judgment below clearly acknowledges that his action was filed under RCW 7.24.020.

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

The failure to join an affected party in a declaratory judgment action relates directly to the trial court's jurisdiction. *Henry v. Town of Oakville*, 30 Wn. App. 240, 243, 633 P.2d 892 (1981), citing *Williams v. Poulsbo Rural Telephone Assn.*, 87 Wn.2d 636, 643, 555 P.2d 1173 (1976). Failure to join an affected party as a basis for dismissal may properly be considered for the first time on appeal. *Id.*

In *Henry*, the plaintiff filed suit against Oakville challenging the validity of three town ordinances, claiming they had been adopted in violation of notice requirements of the Open Public Meetings Act. *Henry*, at 242. The three town ordinances in question authorized a bond issue for water system improvements and established new water rights to repay the fund debt. The bondholder was not a party to the action. *Id.* The Court of Appeals held that in the absence of the bondholder as a party, the trial court was without jurisdiction to proceed in a declaratory judgment action challenging the validity of ordinances authorizing the issuance of municipal bonds and providing for their payment. *Henry*, at 246. The Court held that the bondholder was a necessary party to the declaratory judgment action even though the bondholder, as a good-faith purchaser, could maintain an independent and probably successful action to recover on the bonds. *Henry*, at 244-45.

In the present case, the City's interest in its abatement lien parallels the interest of the bondholder in *Henry*. In seeking a declaratory judgment that his Lincoln Street property should be divided into two separate parcels, Wyss seeks to effectively avoid the City's abatement lien on a portion of his land. This result would leave the City without a lien interest on land, a less secure position, forcing it to sue Wyss for the amount of its abatement costs that could no longer be realized through the assessment rolls and collection under RCW 35.80.030(1)(h). *See also*, Section 908, *Uniform Code for The Abatement of Dangerous Buildings* (1997), at CP 151. The fact that the City would have to sue to collect its abatement costs demonstrates that the City is an affected party under RCW 7.24.110. *Henry*, at 245. Consequently, Wyss may not maintain his declaratory judgment action in the absence of the City as a necessary party under RCW 7.24.110, and the trial court's decision should be affirmed on this basis, in addition to the grounds set forth below.

C. Wyss improperly collaterally attacks the 2005 superior court judgment invalidating his attempted subdivision by quitclaim deed.

Wyss attempts to reframe the issues he raised in his complaint below to assert that the County somehow attempts to collaterally attack his admittedly illegal 1999 subdivision based on the 2005 Grays Harbor County Superior Court summary judgment decision invalidating his

quitclaim deed. *Appellant's Opening Brief*, 2. Wyss then proceeds to collaterally attack the Grays Harbor County Superior Court's jurisdiction (and consequently that of the Court of Appeals in its subsequent affirmance) several years after the mandate was issued in that case.

Appellant's Opening Brief, 3. Wyss' claims in this appeal are based on three false assumptions unsupported in the record below, are not briefed and that are not supported by Washington law: (1) that the County has land use jurisdiction over land situated within an incorporated city's municipal limits, (2) that the County Assessor's⁶ simply assigning tax parcel numbers to real property constitute a "land use decision" under RCW 36.70C.020 (2), and (3) that the Grays Harbor County Superior Court's 2005 summary judgment decision failed to "rescind" Wyss' illegal subdivision, leaving it legally in effect.⁷ (CP 3, 9.) Each of appellant's false assumptions will be discussed below.

⁶Wyss refers to the Auditor several times in his opening brief, but fails to explain what action the Auditor took that he claims is a "land use decision." *See, Appellant's Opening Brief*, 2, 3, 22, 23. The only involvement by the Auditor was to simply record 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.

⁷Wyss makes these same legally and factually unsupported assumptions that his attempted subdivision by quitclaim deed in 1999 was "illegal, but valid" in his pending appeal before this 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.

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

Wyss first incorrectly assumes that the County Assessor’s office action in assigning two tax parcel numbers for each of two “lots” illegally created by Wyss’ quitclaim deed is a land use decision for purposes of LUPA. *Appellant’s Opening Brief*, 5. But Wyss fails to present even a cursory analysis of whether a county assessor’s action in simply assigning tax parcel numbers to land constitutes a land use decision under LUPA; Wyss merely assumes for purposes of this appeal that is the case. From this incorrect and unsupportable assumption, Wyss leaps to the flawed conclusion that, contrary to the prior 2005 superior court ruling voiding his attempted illegal subdivision by the 1999 quitclaim deed, “the two-lot subdivision remains viable” because no LUPA appeal was filed by either the City or the County. *Appellant’s Opening Brief*, 24.

But neither Wyss’ court-invalidated September 21, 1999 quitclaim deed recording, nor the County Assessor’s action assigning separate tax parcel numbers in reliance on Wyss’ invalid deed constitute a land use decision under LUPA. It is not recognized in the appellant’s opening brief that the fact the County Auditor recorded the 1999 quitclaim deed at Wyss’ request does not constitute a subdivision of property by the Auditor (or County) under chapter 58.17 RCW. The County Auditor’s action in recording Wyss’ 1999 deed is simply to carry out the Auditor’s duty to record deeds upon payment of fees specified by RCW 36.18.010. RCW

65.04.030 requires the 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.” RCW 36.70C.020(2).

A “land use decision” is defined by RCW 36.70C.020 (2) to mean:

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

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, 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;

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

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. 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.

Wyss fails to cite any relevant legal authority, and the County has found none, supporting his assertion that when a County Assessor assigns

real property tax parcel numbers, he or she is making a *land use decision* under RCW 36.70C.020 (2) or for any subdivision purpose under RCW 58.17.

The first defined action constituting a “land use decision” under RCW 36.70C.020 (2), requires the Assessor’s action in assigning tax parcel numbers be “a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals.” But the Assessor’s assignment of tax parcel numbers not “a final determination,” but is simply a manner of listing real property required by RCW 84.40.160, which provides in relevant part:

...That the assessor shall give to each tract of land where described by metes and bounds a number, to be designated as Tax No. . . . , which said number shall be placed on the tax rolls to indicate that certain piece of 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 . . .

RCW 84.40.160 requires an assessor to assign tax parcel numbers *only as a means of listing real property*, not for land development or subdivision creation, which is governed by RCW 58.17 and, in the case of

land located within the City of Hoquiam, by HMC Title 9.⁸ (CP 15-24.) Thus RCW 84.40 is a *tax valuation and listing* chapter, not a land use or subdivision chapter, and the assignment or cancellation of tax parcel numbers under RCW 84.40.160 is merely a means of listing property subject to tax under that chapter.⁹ To the extent that decisions of an assessor under RCW 84.40.160 to assign tax parcel numbers affect valuation of property, they are subject to appeal to a county board of equalization and are not “final decisions” under LUPA. RCW 84.40.038. RCW 84.40.042 also implicitly, if not explicitly recognizes that real property must be divided in accordance with chapter 58.17 RCW; nothing in this section authorizes an assessor to subdivide real property, however. Neither does RCW 58.17 provide for subdividing land by assignment of tax parcel numbers. The County has found no reported Washington case or statutory authority recognizing any county assessor authority to make *land use determinations* as defined by RCW 36.70C.020(2), or by assignment of tax parcel numbers under RCW 84.40.160.

⁸Wyss also erroneously cites RCW 58.17.190 for his theory that the County is required to 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 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 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.

⁹Consistent with this requirement to assign tax parcel numbers, Washington law also provides that plats “shall be submitted to the county assessor of the county wherein the plat is located, *for the sole purpose* of assignment of parcel, tract, block and or lot numbers...” [Emphasis added.] RCW 58.18.010(5).

Second, neither is assignment of tax parcel numbers by an assessor “an application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used.” RCW 36.70C.020 (2)(a). Assignment of tax parcel numbers is not an application for anything.

Third, assignment of tax parcel numbers by an assessor is not “an interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property.” RCW 36.70C.020 (2)(b).

Finally, assignment of tax parcel numbers by an assessor is not the “enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property.” RCW 36.70C.020 (2)(c).

Wyss fails to point to any evidence in the record or cite applicable statutory or case law controverting the Assessor’s statement that “[t]he Assessor’s office does not approve or establish real property subdivisions within incorporated or unincorporated areas of the County.” (CP 59.)

Consistent with the Assessor’s law of authority to issue a land use decision by simply assigning tax parcel numbers in response to Wyss’ 1999 quitclaim deed submission, neither is the Assessor authorized to “rescind” a subdivision (legally established or not) by combining tax parcel numbers in response to the superior court summary judgment order

of October 17, 2005. Wyss simply *makes an unwarranted assumption* the Assessor made a land use decision, but does not and cannot provide any supporting legal authority for this assertion.

Wyss cites several reported decisions not involving assignment of tax parcel numbers by an assessor, but supporting “Washington’s longstanding policy favoring the finality of land use decisions.” *See, e.g., Thurston County v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 329, 190 P.3d 38 (2008); *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.2d 25 (2007); *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002); *Washington Sportsmen’s Association v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000). *Appellant’s Opening Brief*, 15. While none of these decisions cited by the appellant involve or even address a county assessor’s responsibility to assign tax parcel numbers under RCW 84.40.160, neither do any of the cited cases stand as authority for a county assessor to issue any land use decisions, whether over lands inside or outside incorporated areas.

We cannot *assume* any decision or action by a county official or county office is a “land use decision” under LUPA; the decision or action in question must be one of the actions or determinations defined in RCW 36.70C.020 (2) as a land use decision. The Grays Harbor County Assessor’s office assignment of tax parcel numbers for the property at 314 Lincoln Street in Hoquiam does not constitute a land use decision under

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

2. The County has no land use decision authority over Wyss' real property located within the corporate limits of the City of Hoquiam.

A second fatal flaw in the arguments Mr. Wyss' presents in his opening brief lies in the fact that the County has no legal authority to issue any land use decisions concerning real property located within the corporate boundaries of the City. Hoquiam is a municipal corporation authorized by Article 11, Section 10 of the Washington Constitution. The City "may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."

Washington Const. Art. 11, Sec. 11. Cities are authorized to adopt and enforce regulations and procedures for approval of short subdivisions.¹⁰ RCW 58.17.060(1). The City of Hoquiam has adopted HMC Chapter 9.07 setting forth regulations for the approval of short subdivisions of land in the City. (CP 15-20). Consistent with the application of the City's subdivision code to land inside Hoquiam, the County's subdivision regulations expressly apply only to unincorporated areas of Grays Harbor

¹⁰A short subdivision is the division or redivision of land into four or fewer lots, tracts, parcels, sites, or divisions for the purpose of sale, lease, or transfer of ownership. RCW 58.17.010 (6).

County.¹¹ Clearly then, the County has no land use authority to approve any subdivision of land located within the incorporated area of the City.

Under LUPA, the definition of local jurisdiction only includes “a county, city, or incorporated town.” *Samuel’s Furniture, Inc. v. Ecology*, 147 Wn.2d 440, 453, 54 P.3d 1194 (2002), at Footnote 12, citing RCW 36.70C.020(2). “The ‘local jurisdiction’s body or officer with the highest level of authority to make the determination’ necessarily refers 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 “approve, approve with conditions, or deny short subdivision application[s]” concerning real property located within the City of Hoquiam is the City Engineer. HMC 9.07.070 (1); CP 18. The City Council has the highest level of authority to review the City Engineer’s decision on a short subdivision application in Hoquiam. HMC 9.07.080; CP 18.

Clearly and incontrovertibly, the County cannot issue short subdivision approvals on real property lying within the City. Similarly, the County (including its officers, whether they include the Assessor or Auditor) *has no authority what so ever* to administratively review land use decisions involving subdivisions of land within the City of Hoquiam. For this reason alone, there is no merit in law or fact to Wyss’ claims that the

¹¹Grays Harbor County Code (“GHCC”) 16.04.010 (B); GHCC 16.08.010. *See Appendix A* attached to this brief.

County issued any land use decision relating to his 314 Lincoln Street property. It is telling that Wyss fails to even address this issue in his opening brief.

Without supporting legal authority in Washington holding that a county can legally make any land use determination on property located *within incorporated city limits*, Wyss' assertion in this appeal that the County effectively made any such a land use decision with respect to his 314 Lincoln Street property is not well grounded in fact or warranted by law, and is frivolous.

D. The 2005 Grays Harbor County Superior Court summary judgment decision properly invalidated and “rescinded” Wyss’ purported two-lot subdivision by quitclaim deed.

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

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

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

To “rescind” is to “make void (as an act) by action of the enacting authority or a superior authority.”¹² The terms “invalid” and “void” are synonymous with “rescind.”¹³ No reasonable reading of the superior court’s summary judgment order of October 17, 2005, can reach any other conclusion but that the 1999 quitclaim deed is invalidated, voided *and rescinded* by the court. In Wyss’ subsequent appeal of this 2005 superior court judgment, the Court of Appeals held that “the transfer was illegal.” (CP 56.) In determining that the quitclaim deed was illegal and invalid, the trial court necessarily rescinded it. The fact that the trial court did not expressly use the term “rescinds” is of no moment.

Despite the clear absence of County jurisdiction to make land use determinations on land situated within the City, Wyss nevertheless claims that a letter he received from a deputy county treasurer purports to show

¹²*Merriam-Webster Online*, <http://www.merriam-webster.com/dictionary/rescind>

¹³*Merriam-Webster Online*, <http://www.merriam-webster.com/dictionary/rescind>, (Thesaurus).

that the County “rescinded” his 1999 subdivision. *Appellant’s Opening Brief*, 11-12. The April 10, 2009 letter to Mr. Wyss from Debra Mattson of the County Treasurer’s office (CP 162), while inartfully worded, does not constitute or confirm a land use decision that Wyss’ judicially invalidated subdivision is legally valid. Mattson later acknowledged this inaccurate use of the term “rescinded,” confirming that “. . . neither the Treasurer, nor the County approves or disapproves any subdivisions or other land uses occurring within the incorporated limits of the City . . . ” (CP 68.) This fact should be well-known to Mr. Wyss, who ignores the information in the first paragraph of Mattson’s April 10, 2009 letter stating “the subdivision of the parcel had been deemed unlawful and invalid by [Grays Harbor County Superior Court] Judge Mark McCauley.” (CP 162.)

Just as the County cannot approve or review subdivisions or issue any other land use decision concerning land lying wholly within the City, neither can it “rescind” nor take any other action to invalidate land use decisions on property lying with the City.

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

The County seeks attorney fees and costs for a frivolous appeal under RAP 18.9 (a). This rule permits this court, on its own motion or that of a party, to require a party to pay the fees of another party for defending a frivolous appeal. *Fay v. NW. Airlines, Inc.*, 115 Wn.2d 194, 200-01, 796

P.2d 412 (1990). Pursuing a frivolous appeal justifies the imposition of terms and compensatory damages. *Green River Community College District No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 442-43, 730 P.2d 653 (1986) (quoting *Boyles v. Department of Retirement Systems*, 105 Wn.2d 499, 509, 716 P.2d 869 (1983) (Utter, J., concurring in part, dissenting in part)); *Pearson v. Schubach*, 52 Wn.App. 716, 725-26, 763 P.2d 834 (1988).

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

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

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

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

IV. CONCLUSION.

There is no “existing subdivision” relating to the 314 Lincoln Street property and no “land use decision” by the County, despite the unsupported assumptions by the appellant. Wyss’ assignments of error and arguments without citation to any supporting Washington law, that the County Auditor and/or Assessor somehow made land use decisions regarding the 314 Lincoln Street property is not well grounded in fact nor warranted by law. The County asks that the Court affirm the decision of the trial court below, dismiss this appeal and award the County its costs and attorney fees against appellant and his counsel for prosecuting a frivolous appeal under RAP 18.9.

DATED: this 30 day of June, 2011.

Respectfully Submitted,

By: 
JAMES G. BAKER
Senior Deputy Prosecuting
Attorney
WSBA #12446

APPENDIX A

Excerpts from Grays Harbor County Code, Title 16, Subdivisions:

16.04.010 Findings.

The board of county commissioners of Grays Harbor County, Washington, finds that:

- A. In order to protect and promote the public health, safety, and general welfare, subdivision of land should proceed in a manner that: provides for the continuation of streets within subdivisions with other existing or planned streets and with major street and highway plans of the county and other municipalities; provides for access to and extension of the necessary public facilities; assures adequate provision for water supply, sewage disposal, and protection of natural drainage systems, parks, fire protection, and schools; provides for adequate open space for traffic, recreation, light, and air; and provides for uniform land monuments and conveyance by accurate legal description.
- B. Proper application of regulations established by RCW 58.17, as amended, requires that specific standards and administrative procedures relating to subdivision of land in unincorporated areas of the county be provided.
- C. This title is necessary to further the purposes and objectives of the Grays Harbor County comprehensive plan established pursuant to RCW 36.70.

(Ord. 111 § 1.10, 1983)

(Ord. No. 386, § 1, 6-7-2010)

16.08.010 General scope.

Subdivisions of land for the purpose of lease, sale, or transfer of ownership into two or more lots and the development of land for mobile home parks and recreational vehicle parks within unincorporated areas of Grays Harbor County shall comply with this title.

Mobile home parks and recreational vehicle parks are processed under the applicable provisions of Chapters 16.24 and 16.28 and are not reviewed under chapters pertaining to long subdivision or short subdivision procedures. Subdivisions of land for sale or transfer of ownership where the lots are to be occupied by mobile homes (mobile home subdivisions) are to proceed in compliance with the short subdivision, long subdivision, or large lot subdivision sections of this title, as applicable.

(Ord. 111 § 3.10, 1983)

(Ord. No. 387, § 1, 6-7-2010)

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

STATE OF WASHINGTON,

Respondent,

No.: 41298-5-II

v.

DECLARATION OF MAILING

JOHN R. WYSS,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 1ST day of July, 2011, I mailed three (3) copies of the Brief of

Respondent to:

Scott E. Stafne
Rebecca Thorley
Andrew J. Krawczyk
Stafne Law Firm
239 North Olympic Avenue
Arlington, WA 98223-1336

STATE OF WASHINGTON
BY DEPUTY
11 JUL -5 AM 10:48
COURT CLERK

by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 1ST day of July, 2011, at Montesano, Washington.

Barbara Chapman