

No. 41691-3-II

COURT OF APPEALS DIVISION TWO
OF THE STATE OF WASHINGTON

JOHN R. WYSS
Plaintiff/Appellant

vs.

GRAYS HARBOR COUNTY
Defendant/Appellee

APPEAL FROM SUPERIOR COURT
FOR GRAYS HARBOR COUNTY

APPELLANT'S REPLY BRIEF

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Appellant's Reply to: "I. INTRODUCTION"
(Response at p. 1).

Mr. Wyss does not accept the statement in the County's introduction suggesting this is an appeal of a foreclosure brought pursuant to RCW 84.64. Grays Harbor Response Brief ("Response") at p. 1. Mr. Wyss claims the change in the *res* during the three years prior to the foreclosure violated RCW 84.64.050. Compliance with RCW 84.64.050 was a condition precedent to bringing a foreclosure action pursuant to RCW Ch. 84.64. Therefore, the County's failure to comply with RCW 84.64.050 deprived the Superior Court of subject matter jurisdiction to grant a foreclosure pursuant to RCW Chapter 84.64.

Further, Mr. Wyss contends that the Superior Court's decision foreclosing the assessment lien on all of Wyss's property constituted a collateral attack on: (1) the County's 1999 recordation of Wyss's two lots and (2) City of Hoquiam's administrative decision to apply its abatement lien to only one lot. Such attack is contrary to RCW 36.70C.020 and .030, as well as, RCW 58.17.190 and the Superior Court lacked subject matter jurisdiction to order such a result.

Appellant's Reply to: "II. MOTION FOR DISMISSAL"
(Response, at pp. 1-4).

Wyss asks the respondent's motion for dismissal be denied. Response, at pp. 1-4 The County originally filed a motion on the merits contending this appeal should be dismissed because Wyss had not perfected an appeal pursuant to RCW 84.64.120. *See* County's Motion to Dismiss [sic] at p.2. The motion on the merits was denied. *See* Commissioner's ruling denying County's motion.

The County's change in the *res* to which the 2007 abatement lien was attached in 2009 (by the Assessor informally merging Wyss's two lots in 2009) enlarged the *res* to be foreclosed upon during the three year statutory waiting period set forth in RCW 84.64.050. The County's change breached a condition precedent to the Superior Court's assumption of subject matter jurisdiction under Chapter 84.64 RCW. This rendered the Superior Court's judgment and order of sale void. *See* RCW 84.64.050; *Rosholt v. County of Snohomish*, 19 Wn. App. 300, 304, 575 P.2d 726 (1978) (Jurisdiction for a foreclosure pursuant to RCW 84.64.050 is dependent on compliance with the statute); *Mueller v. Miller*, 82 Wn. App. 236, 917 P.2d 604 (1996) (An accurate property description is necessary for the Superior Court to acquire subject matter jurisdiction necessary to approve a tax sale); *In Re Foreclosure of Liens*, 117 Wn.2d 77, 81-87,

811 P.2d. 945 (1991); *Pierce County v Evans*, 17 Wn. App. 201, 204, 563 P.2d 1263 (1977); *cf.*, *Homeowners Solutions, LLC v. Nguyen*, 148 Wn. App. 545, 200 P.2d 743, (2009) (Holding County had no authority to foreclose on demolition lien until after expiration of statutory waiting period.)

As the Superior Court had no jurisdiction under Chapter 84.64 RCW because of the County's failure to comply with RCW 84.64.050, this appeal is brought by Wyss pursuant to the judiciary's inherent power. *See, e.g., Wilson v. Nord*, 23 Wn. App. 366, 371-3, 597 P.2d 914 (1979) (and cases cited therein). The legislature cannot diminish or expand the inherent jurisdiction of the judicial branch of government to decide whether a government entity or official has acted illegally and/or in an arbitrary and capricious manner. *Id.*; *see also, Household Fin. Corp. v. State*, 40 Wn.2d 451, 455- 458, 244 P.2d 260 (1952).

In this appeal, Wyss's companion appeal (Appeal No. 41298-5-II), and in response to the County's Motion on the Merits Wyss contends the County Assessor's informal merging of two separate lots into one to accommodate the request of Hoquiam's City Attorney during the three year waiting period violated Washington laws and constituted arbitrary and capricious action.

**Appellant's Reply to: "VI. STATEMENT OF CASE"
(Response at pp. 4-7).¹**

Wyss asks this Court take judicial notice of the decisions referred to at pages 4 -7 of the County's Response Brief² and deny the County's request to strike. These administrative, trial court and appellate court decisions can be found at pages 2 - 58 of the Clerk's Papers in Appeal No. 41298-5-II. That appeal, which is also currently pending before this Court, challenges a decision by the Thurston County Superior Court granting a motion for summary judgment by the County denying Wyss declaratory and injunctive action to prevent the foreclosure which is being challenged as part of this appeal.

At all material times state law provided County officials with the authority to create and file plats for property located within the City of Hoquiam. State law also set forth a specific procedure to remove plats

¹ Appellant notes that the Statement of Case is inadequate. Washington's Rules of Appellate Procedure requires: "Reference to the record must be included for each factual statement." RAP 10.3 (a) (5). The County cites only to the County's own briefing setting forth the County's version of the facts. See Response at p. 4 (citing Clerk's Papers (CP) at pp. 12-16).

² Wyss would also note with regard to the facts set forth by the County's Response Brief that a party is bound by the concessions made in its brief and during oral argument. *Hilao v. Estate of Marcos*, 393 F.3d 987, 993 (9th Cir. 2004). The County cites one of the unpublished cases in the long litigation history between Wyss and Hoquiam. See CP 19, FN 2. The unpublished decision is significant because this Court held Wyss's quitclaiming property to his son created an "illegal subdivision". CP 23 - 24 ("The trial court properly found that the deed from Wyss to James was illegal).

where they had been created by the County Auditor in violation of the Hoquiam's municipal ordinances. These statutory provisions, and others which are relevant to this appeal, are set forth below.

[RCW 58.18.020 (2) states:]

"Plat" is a map or representation of a subdivision, showing thereon the division of a tract or parcel of land into lots, blocks, streets and alleys, or other divisions and dedications.

[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 58.17.010 states in pertinent part:]

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 58.18.020; 58.10.010; 58.17.010; 58.17.190 (Emphasis Supplied).

Additionally, the following provisions of the Land Use Petition Act (LUPA) (Ch. 36.70C RCW) were applicable to the County's ministerial and quasi-judicial land use decisions during this time period.

[RCW 36.70C.030 states in pertinent part:]

(1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:

* * *

(b) Judicial review of applications for a writ of mandamus or prohibition; ...

[RCW 36.70C.040 states in pertinent part:]

(1) Proceedings for review under this chapter shall be commenced by filing a land use petition in superior court.

(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 ...*

(3) The petition is timely if it is filed and served on all parties listed in subsection (2) of this section *within twenty-one days of the issuance of the land use decision.*

RCW 36.70C.030-.040 (Emphasis Supplied).

The County admits it created a new tax parcel as a result of Mr. Wyss's quit claim deed. *See* Response at p. 5. The County also created two lots on the tax rolls and the County's public plat map. *See* CP 23. Copies

of the Auditor's maps as they existed on the Auditor's web site in 1999 until the Auditor merged the lots in 2009 are attached to Wyss's Opening Brief. *See* Appellant's Opening Brief at Appendix 1.

The County has not objected to these maps and Wyss asks this Court to take judicial notice that these Auditor plat maps indicate that Wyss's parcel was divided into two lots by the County in 1999.

The County's statement of facts does not make clear, and it should, that except for Wyss's ongoing appeal of the Thurston County Superior Court's decision in this Court (Appeal No. 41298-5-II), all of the litigation referred to in its Response occurred well before Hoquiam administratively applied an assessment lien to **one** parcel on the Assessor's map in 2007. The only parcel that Hoquiam assessed with its lien in 2007 was legally described as KARRS HILL SLY 84' **LS N 40'** of LOTS 7 & 8 BLK 8. [emphasis supplied] CP 37, ¶¶ 3 & 4; Exhibit 2 at 43-44. As this decision was not appealed, it is a final administrative decision.³

Exhibit 3 to Wyss's declaration is a copy of his tax bill for that same lot in 2008. This tax bill substantiates that well after the thirty appeal deadline had passed the City had not appealed the abatement lien so as to encompass Wyss's other lot. *See* CP 37, ¶ 4; CP 45. Nonetheless,

³ As is pointed out at pages 21 - 23 of Wyss's Opening Brief section 906 of the Uniform Code of Abatement, which was applicable to Hoquiam's abatement decision, provides a 30 day appeal period.

in 2010 the County sought to foreclose on more than the lot to which the abatement lien had been attached. *See* CP 39-42 ("Amended Certificate of Delinquency"). In 2010 the County sought to apply abatement lien to both of Wyss parcels, which were then legally described as KARRS HILL SLY 84' OF LOTS 7 & 8 BLK 8. *See* CP 41-42.

The County clearly describes the Assessor's decision-making process to merge the lots in its Response:

By letter dated March 9, 2009, the City notified the Grays Harbor County Assessor that Grays Harbor County Superior Court invalidated Wyss's purported subdivision by Quit Claim Deed. *Id.* In response, the Assessor cancelled tax parcel number 053800800703 and listed the plaintiff's property as a single lot under the original tax parcel number 053800800702. *Id.* That parcel is the subject of the tax foreclosure.

Response at p. 6; *see also*, CP 15:6-11 (setting forth an identical statement of these facts to the lower court).

**Appellant's Reply to: "ARGUMENT; A. This case does not involve an administrative appeal"
(Response, pp. 7-8).**

The County's first argument is this Court should not consider Wyss's argument that this case involves a collateral attack of land use decisions under LUPA because they were not made in the Superior Court. Response at pp. 7 - 8. Wyss disagrees. Wyss denied the Superior Court had subject matter jurisdiction over the tax lien. CP 9 at ¶ 2.1. Wyss

presented argument and evidence which showed the abatement lien was only applied in 2007 to parcel 053800800703, which was legally described as KARRS HILL SLY 84' *LS N 40'* of LOTS 7 & 8 BLK 8, CP 37 - 46. Any challenge to Hoquiam's assessment lien had to be made within the 30 day administrative appeal period in order to comply with LUPA's exhaustion of remedies requirement. *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).

The Superior Court had no appellate or original jurisdiction to change the limited scope of this unappealed assessment. "A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court...". RCW 37.70C.040(2). The effect of the Superior Court's order allowing foreclosure of all of Wyss's property affronts the collateral estoppel effect of Hoquiam's adjudication of the assessment lien to apply only to KARRS HILL SLY 84' *LS N 40'* of LOTS 7 & 8 BLK 8. CP 43-45. The Superior Court could not use the foreclosure statute to obtain jurisdiction to alter Hoquiam's land use decision because 1.) this changed the property description within the three year waiting period; and 2.) because other statutes do not alter LUPA's bar to a Court assuming jurisdiction to alter a land use decision once its limitations period has expired. *See Infra*.

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, 248 P.3d 532 (2011); *In re Marriage of Kastanas*, 78 Wn. App. 193, 201, 869 P.2d 726 (1995); CR 12 (h) (3); *cf. Henderson v Shinseki*, 131 S. Ct. 1197, 179 L. Ed. 2d 159 (2011).⁴

⁴ In *Shinseki* the Supreme Court described the reasons why issues of subject matter jurisdiction are sufficiently important that a court has a duty to consider its authority to act even where the parties do not make such a challenge.

Courts do not usually raise claims or arguments on their own. But federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press. *See* [*Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097. (U.S. 2006)].

Jurisdictional rules may also result in the waste of judicial resources and may unfairly prejudice litigants. For purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be raised at particular times. *See* [*Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356-357, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006)]. Objections to subject-matter jurisdiction, however, may be raised at any time. Thus, a party, after losing at trial, may move to dismiss the case because the trial court lacked subject-matter jurisdiction. *Arbaugh*, 546 U. S., at 508. Indeed, a party may raise such an objection even if the party had previously acknowledged the trial court's jurisdiction. *Ibid.* And if the trial court lacked jurisdiction, many months of work on the part of the attorneys and the court may be wasted.

Henderson v Shinseki, 131 S. Ct. 1197, 1202; 179 L. Ed. 2d 159, 166 (2011).

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 SUPERIOR COURT'S LACKED SUBJECT MATTER
JURISDICTION TO GRANT A FORECLOSE PURSUANT TO RCW
CHAPTER 84.64.

A foreclosure action is a statutory proceeding. A superior court has no jurisdiction to sanction a foreclosure except that which is conferred by applicable statutes. RCW 84.64.050; *In re Proceedings of King County for Foreclosure of Liens for Delinquent Real Property Taxes for Years 1985 Through 1988*, 117 Wn.2d 77, 811 P.2d 945 (1991) (An accurate property description is necessary for a Superior Court to acquire the subject matter jurisdiction over the *res* necessary to approve a tax sale.); *Moller v. Graham*, 106 Wash. 205, 207-08, 179 P. 858 (1919)⁵; *In re Proceedings of Pierce County for Foreclosure of Liens for Delinquent Real Property Taxes for Year 1974 and Some Prior Years*, 48 Wn. App. 418, 421-4, 739 P.2d

⁵ *Moller* states:

The fact that the property may have appeared on the tax rolls for subsequent years as Bowman's Plat would not modify the requirement that the description upon the tax rolls and the description in the published summons must be the same for the years for which the delinquent taxes are being foreclosed.

106 Wash. at 207-8.

116 (1987) (County could not foreclose on demolition liens until the statute's 5 year expiration period had passed.)

In this case, the face of the record before the Superior Court indicated the County had changed the description of the property being foreclosed upon within the three year waiting period. CP 37-45; 46-48. As the property description was changed before the condition precedent set for in RCW 84.64.050 was met, the Court never acquired jurisdiction to foreclose on the new legally described property. CP 37-45, 46-48.

LUPA BARRED THE SUPERIOR COURT FROM EXERCISING
SUBJECT MATTER JURISDICTION TO CHANGE
THE CONSEQUENCES OF HOQUIM'S 2007 FINAL
LAND USE ACTION APPLYING ITS ABATEMENT
LIEN TO ONLY ONE OF WYSS' LOTS.

As the County notes at pages 8 and 9 of its brief a "land use decision" is defined by RCW 36.70C.020(2)(c) to include "the enforcement by a local jurisdiction of ordinances regulating improvement, development, modification, maintenance or use of real property." The unpublished decision by this Court held that the ordinance pursuant to which Wyss's home was deemed a dangerous building was a land use decision, which had to be appealed pursuant to LUPA. (A copy of that decision can be found in the Clerks Papers 31 - 34 of Appeal No. 41298-5-II.) Hoquiam's imposition of a lien enforcing the abatement of the building on Wyss's property would therefore appear to be a land use

enforcement decision under RCW 36.70C.020(2)(c) pursuant to the sections 906, 908, 910 and 911 of The Uniform Code for the Abatement of Dangerous Buildings, 1997 Edition⁶:

[906:] The validity of any assessment made under the provisions of this chapter shall not be contested in any action or proceeding unless the same is commenced within 30 days after the assessment is placed on the assessment roll as provided herein. Any appeal from a final judgment in such proceeding must be perfected within 30 days after the entry of such judgment.

* * *

[908:] Immediately upon its being placed on the assessment roll the assessment shall be deemed complete...

* * *

[910:] If the county assessor and the county tax collector assess property taxes for this jurisdiction, a certified copy of the assessment shall be filed with the county auditor on or before August 10th. **The descriptions of the parcels reported shall be those used for the same parcels on the county assessor's map books for the current year.**

* * *

[911:] The amount of the assessment shall be collected at the same time and in the same manner as ordinary property taxes are collected and shall be subject to the same penalties and procedures and in case of delinquency as provided for ordinary property taxes. **All laws applicable to the levy, collection and enforcement of property taxes shall be applicable to such assessment.**

Uniform Abatement of Dangerous Buildings as adopted by HCC 2.22.010 (Emphasis Supplied). The Superior Court had no authority to alter this administrative decision years after it was made. This is true even

⁶ Wyss asks this Court take judicial notice of these ordinances. HCC 2.22.010. *See also*, Appeal No. 41298-5-II, CP 154 and 151- 152.

though the County is relying on another statute as a means to change the consequences of Hoquiam's placement of its lien on KARRS HILL SLY 84' *LS N 40'* of LOTS 7 & 8 BLK 8. A collateral attack on a final land use decision under LUPA is not allowed even where another statute, like RCW Chapter 84.64, may also apply. *See, e.g., Twin Bridge Marine Park, L.L.C. v. State, Dept. of Ecology*, 162 Wn.2d 825, 175 P.3d 1050 (2008); *Samuels Furniture v Department of Ecology*, 147 Wn.2d 440, 448-461, 54 P.3d 1194 (2002); *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 26 P.3d 241 (2001); *Woods v. Kittitas County*, 162 Wn.2d 597, 620-621, 174 P.3d 25 (2007).

THE SUPERIOR COURT HAD NO SUBJECT MATTER JURISDICTION TO MODIFY THE COUNTY'S CREATION OF TWO LOTS IN 1999 PURSUANT TO ITS ORIGINAL JURISDICTION.

Washington law and policy limits the role the judiciary plays with regards to land use decisions. For example, on June 16, 2011 our Supreme Court noted in *Phoenix Development, Inc.*:

Although this is not a Growth Management Act (GMA) (ch. 36.70A RCW) case, to the extent that the GMA is implicated, we note that the GMA does not prescribe a single approach to growth management. *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 125, 118 P.3d 322 (2005). Instead, the legislature specified that "the ultimate burden and responsibility for planning, harmonizing the planning goals of [the GMA], and implementing a county's or city's future rests with that community." *Id.* (alteration in original) (quoting RCW 36.70A.3201). Thus, the GMA acts exclusively through local governments and is to be

construed with the requisite flexibility to allow local governments to accommodate local needs. *Id.* at 125-26. These principles of deference apply to a local government's site-specific land use decisions where the GMA considerations play a role in its ultimate decision.

Phoenix Development, Inc. v. City of Woodinville, No. 84296-5, at

*10, 2011 Wash. LEXIS 434 (Wash. June 16, 2011).⁷

The Supreme also noted in *Phoenix* the limited nature of relief courts can provide with regard to certain municipal land development decisions:

We also note our long-standing precedent that courts "do not possess the power to amend zoning ordinances or to rezone a zoned area." *Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 161, 170, 995 P.2d 33 (2000) (quoting *Bishop v. Town of Houghton*, 69 Wn.2d 786, 792, 420 P.2d 368 (1966)); see also *McNaughton v. Boeing*, 68 Wn.2d 659, 414 P.2d 778 (1966); *State ex rel. Gunning v. Odell*, 58 Wn.2d 275, 362 P.2d 254 (1961). LUPA did not abrogate this rule. *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 146 P.3d 914 (2006); *In re Marriage of Williams*, 115 Wn.2d 202, 208, 796 P.2d 421 (1990).

Phoenix, No. 84296-5, at *17, FN 17.

⁷ *City of Arlington* is a case which identifies how the principle of deference applies to municipal legislative decisions under the GMA. See *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.* 164 Wn.2d 768, 193 P.3d 1077 (2008). In *Arlington* the Supreme Court held that an earlier legislative decision failing to designate the same land as resource land did not have a collateral estoppel or res judicata effect with regard to a subsequent legislative policy approving a resource designation for the same land. *Id.* Instead, the Court held because the GMA required the GMHB to afford deference to each of the County's legislative policy designation decisions it should have deferred to the County's de-designation of the resource land. *Id.*

The legislature and judiciary have expressed Washington's policy limiting courts' authority to review and judicially modify decisions relating municipal land use actions in many ways. The legislature has barred judicial review of both site specific and GMA decisions by municipalities through strict limitations periods. *Woods v. Kittitas County*, 162 Wn.2d 597, 620-621, 174 P.3d 25 (2007). Washington Courts have interpreted these statutes so as to be consistent with Washington's judicial policy of "finality" of procedurally adequate administrative decisions relating to land development. In *Thurston County v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 329, 190 P.3d 38, 45 (2008) the Supreme Court explained Washington's strong finality policy by reiterating "[i]f there were not finality, no owner of land would ever be safe in proceeding with development of his property."⁸ Cases which have followed this policy while applying land use statutes include, but certainly are not limited to: *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25, 30-35 (2007); *Chelan County v. Nykreim*, 146 Wn.2d 904, 938, 52 P.3d 1 (2002); *Wenatchee Sportsmen v Ass'n v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000).

⁸ This quote was taken from *Deschenes v. King County*, 83 Wn.2d 714, 717, 521 P. 2d 1181 (1974) *overruled in part by*, *Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 991 P.2d 161 (2000).

A familiar corollary to the policy of finality is the limitation of Superior Court jurisdiction of land use actions to appellate review pursuant to Const. art. IV § 6. *See, e.g., Conom v. Snohomish County*, 155 Wn.2d 154, 157, 118 P.3d 344 (2005); *see also*, RCW 58.17.190.⁹ This Constitutional provision states in pertinent part:

They [Superior Courts] shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. ... Said courts and their judges shall have power to issue writs of mandamus, ...

Const. art. IV § 6.

⁹ RCW 58.17.190 provides that recording mistakes by the County Auditor that occur inside the boundaries of a city or town shall be correct by a writ of mandate. That provision 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 58.17.190 (Emphasis Supplied). RCW 7.16.180-.250 set forth legislative requirements for the writ of mandamus. The doctrine of "laches" limits the time period in which a writ of mandate can be obtained. *State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transp.*, 142 Wn.2d 328, 339-340, 12 P.3d 134 (2000); *cf.*, *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 240 - 241, 88 P.3d 375 (2004) (doctrine of laches applies to claim for a constitutional writ of certiorari); *Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 846 - 849, 991 P.2d 1161 (2000) (same); *Cotton v. City of Elma*, 100 Wn. App. 685, 694 - 696, 998 P.2d 339 (2000) (doctrine of laches applies to *Quo Warranto* action).

In Section A of the Response, the County claims the Superior Court was not acting in its appellate capacity when it upheld the Assessor's 2009 decision abrogating the County's plats showing Wyss' two lots. Response, pp. 7-8. But this is the very point Wyss is making. Under either RCW 58.17.190 or LUPA the Superior Court had no "original" subject matter jurisdiction to void the County plats recording two lots. In *Davis v. Washington State Dept. of Labor & Industries*, 159 Wn. App. 437, 441-3, 245 P.3d 253 (2011) this Court held a Superior Court's exercise of original jurisdiction where only appellate jurisdiction applied is not appropriate.

**Appellant's Reply to "B: The County Assessor's action of assigning a parcel number to the north 40 feet of Wyss' property did not create a subdivision."
(Response p. 8 – 10).**

The County argues its officials had no authority to create or cancel the two lots which became a part of the County's plats in 1999. Wyss disagrees. RCW 65.04.030 specifically states deeds shall be recorded:

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.*

RCW 65.04.030. (Emphasis Supplied).

Once the Auditor recorded the lot, the Assessor converted it into a map pursuant to RCW 84.40.160, which states in pertinent part:

The assessor shall prepare and possess a complete set of maps drawn to indicate parcel configuration for lands in the county. The assessor shall continually update the maps to reflect transfers, conveyances, acquisitions, or any other transaction or event that changes the boundaries of any parcel and shall renumber the parcels or prepare new map pages for any portion of the maps to show combinations or divisions of parcels.

RCW 84.40.160.

The Auditor apparently creates its own maps or utilizes the Assessor's maps. In any event, 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 58.17.010 states in pertinent part:]

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 58.10.010; RCW 58.17.010; RCW 58.17.190 (Emphasis Supplied).

Although these statutes have never been construed by an appellate court, RCW 58.10.010 unambiguously provides that the Auditor's plat is "conclusive evidence" with regard to the existence of Wyss's two lots since 1999. The statute provided that the Assessor's plat "when filed shall become the official plat for all legal purposes." RCW 58.17.010. The County has not explained why these statutes do not apply with regard to the creation of Wyss' two lots in 1999. Counsel for Wyss can find no statute applicable to the County Assessor¹⁰ or Auditor¹¹ which would undercut the powers granted by the statutes set forth above.

¹⁰ Chapter 36.21 RCW relating to County Assessor's powers has not often been interpreted by appellate courts. *See, e.g., Smith v. Spokane County*, 67 Wn. App. 478, 836 P.2d 854 (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 36.21 cited for proposition that "Property 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 that 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*, 156 Wn.2d 84, 124 P.3d 294 (2005) (Chapter 36.21 RCW cited by dissent).

¹¹ Research indicates that only one appellate case exists with regard to RCW 36.22, the statute relating to county auditors. *See Smith v. Board of Walla Walla County*, 48 Wn. App. 303, 738 P.2d 1076 (1987).

While there is clear statutory authority allowing County officials to create plats in municipalities, the County is correct that there is no authority which allows a County Assessor to dissolve lots which are shown in the County's records. The absence of any written procedures for the land use actions taken by the Assessor violates due process. *Seattle v. Crispin*, 149 Wn.2d 896, 71 P.3d 208 (2003) (We have recognized that the regulation of land use must proceed under an express written code and not be based on ad hoc unwritten rules so vague that a person of common intelligence must guess at the law's meaning and application." *citing Burien Bark Supply v. King County*, 106 Wn.2d 868, 725 P.2d 994 (1986)); *see also, Mathews v. Eldridge*, 424 U.S. 319, 333-335, 96 S.Ct. 893, 47 L. Ed. 2d 18 (1976).

Those lots are conclusive evidence that such lots existed and were the County's official plat for all legal purposes. RCW 58.10.010; RCW 58.17.010. The only way to correct mistakes in these County plats is through RCW 58.17.190 or possibly LUPA.¹² The County Assessor had no constitutional, statutory, inherent or other authority to simply dissolve

¹² Wyss concedes that RCW 58.17.190 may be the clearest remedy for correcting a mistake in the County's records, but is not convinced that LUPA does not apply to the 1999 creation of a two lot subdivision. The County contends that LUPA does not apply because County officials were not authorized to create lots in the city of Hoquiam. Response, pp. 8 - 10. The County has never provided any authority in support of this proposition and its bald assertions fly in the face of RCW 58.10.010; RCW 58.17.010; and RCW 58.17.190.

Mr. Wyss' lots. Government officials, just like everyone else in Washington, must follow land use laws. *See, e.g., Chelan County v. Nykreim*, 146 Wn.2d 904.

The 2005 summary judgment Order did not mandate the County to do anything as the County was not a party to the lawsuit. *See* Appeal No. 41298-5-II; CP 6 – 8;¹³ *Grundy v. Thurston County*, 155 Wn.2d 1, 8, 117 P.3d 1089, 1092 (2005). The City Attorney's representations to the Assessor that the Superior Court did so are patently false.

The County had the statutory authority to plat Wyss' lots in Hoquiam and did so. The County did not have any authority to informally merge Wyss' two lots simply because the Hoquiam City Attorney asked the County to do so and the Courts had no power to enforce this County's illegal actions.

Appellant's Reply to: "C. Wyss argues that the County Assessor did not arbitrarily cancel Wyss' subdivision" (Response p. 10-11).

The County is mistaken. Wyss is arguing the County illegally and/or arbitrarily and capriciously merged his two lots in 2009. *See Supra*.

¹³ Clerk Papers 6-8 in Appeal No. 41298-5-II set forth the 2005 summary judgment decision against Wyss in *Hoquiam v. Wyss*, Grays Harbor Case No. 04-2-00952-8, which the City Attorney represented to the Assessor voided Wyss' subdivision.. Wyss asks this Court take judicial notice of this Order and the fact that the Order does not purport to invalidate any lot or subdivision. It simply invalidates the transfer of property between Wyss and his son.

Further, Wyss contends that this merger, which changed the legal description to which the abatement lien applied during the three year waiting period set forth in RCW 84.64.050, was a condition precedent to the Superior Court acquiring subject matter jurisdiction to foreclose on property. *See Supra*. Additionally, Wyss is contending the Superior Court had no subject matter jurisdiction to change the Hoquiam City Council's adjudication of the abatement lien to apply to more property than KARRS HILL SLY 84' **LS N 40'** of LOTS 7 & 8 BLK 8.

**Appellant's Reply to: "D. The judgment of the Grays
Harbor County Superior Court foreclosing on Mr. Wyss'
is valid and should be upheld"
(Response p. 10-11).**

The County argues that RCW 84.64.080 provides for the foreclosure of liens in a summary. This is true only if the summary procedures provide for due process under the United States Constitution and Washington's Constitutional. *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L. Ed. 2d 556 (1972); *Mitchell v. W.T. Grant*, 416 U.S. 600, 94 S.Ct. 1895, 40 L. Ed. 2d 406 (1974). Moreover, in Washington the statute cannot be used to get around LUPA. *See Supra*, at p. 14.

The County's "irregularities or informalities" argument (Response, at p. 12) is tantamount to arguing that RCW 84.64.080 grants broad discretion to defy a procedural and substantive due process. No case

supports this. There are very few appellate cases which construe this statute. Those cases suggest strict adherence to the language of the statute and the procedural requirements. *See, e.g., Stritzel v. Smith*, 20 Wn. App. 218, 221, 579 P.2d 404 (1978) (where strict compliance with RCW 84.64.080's posting requirement was essential); *c.f., City of Olympia v. Palzer*, 42 Wn. App. 751, 713 P.2d 1125 (1986) (RCW 84.64.080 gives the county treasurer the power to sell property at public auction, but requires them to sell to the highest bidder).

Unchecked discretion, defects of procedure, abuse of discretion, and arbitrary and capricious actions are unlawful errors and unconstitutional. *See supra*. Moreover, the legislature cannot grant the court the power to validate illegal or arbitrary and capricious action. *Wilson v. Nord*, 23 Wn. App. 366, 371-3, 597 P.2d 914 (1979) (and cases cited therein).

Wyss disputes the assessment applied to the whole lot. *See* RCW 36.70C.020(2)(c); HCC 2.22.010 (*incorporating* section 910 of The Uniform Code for the Abatement of Dangerous Buildings, 1997 Edition, which states, in part: "The descriptions of the parcels reported shall be those used for the same parcels on the county assessor's map books for the current year"). Wyss also disputes that parcel No. 053800800703 (legally described as legally described as KARRS HILL SLY 84' *LS N 40'* of

LOTS 7 & 8 BLK 8) did not exist in 2007. *See, e.g.*, RCW 58.10.010;
RCW 58.17.010.

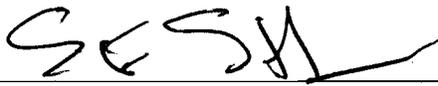
ARGUMENTS TO WHICH THE COUNTY HAS NOT RESPONDED
AND TO WHICH WYSS WILL NOT SPECIFICALLY REPLY

The County's Response does not directly respond to Wyss' arguments set for at sections A, B, C, D, E, F, G, H, or I. Wyss Opening Brief, pp. 14-31. Accordingly, except to the extent set forth above Wyss would ask this Court take into account the County's failure to address these arguments.

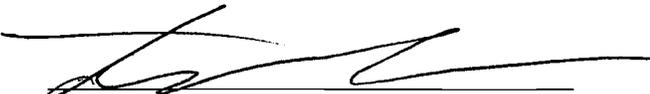
CONCLUSION

This Court should reverse the Superior Court's Order of Default, CP 29-51, and Judgment of Order and Sale. CP 52-54.

Respectfully Submitted, this 24th day of June, 2011. By



Scott E. Stafne, WSBA #6964



Andrew J. Krawczyk, WSBA #42982

No. 41691-3-II

COURT OF APPEALS DIVISION TWO
OF THE STATE OF WASHINGTON

JOHN R. WYSS
Plaintiff/Appellant

vs.

GRAYS HARBOR COUNTY, RESPONDENT

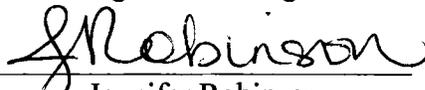
Defendant/Appellee

APPEAL FROM SUPERIOR COURT
FOR GRAYS HARBOR COUNTY

DECLARATION OF SERVICE

I, Jennifer Robinson, declare under the penalty of perjury that I served a copy of Appellant's Reply Brief on appellee's attorney by depositing a copy of that document with the U.S. postal service addressed to Jennifer Wieland, Senior Prosecuting Attorney, 102 W. Broadway, Room 102, Montesano, Washington, 98563, and by faxing to 360-249-6064.

Dated: June 24, 2011, at Arlington, Washington.


Jennifer Robinson

 ORIGINAL