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Court of Appeals
Division III
State of Washington
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Court of Appeals, Division III No. 355969
Benton County Superior Court No. 17-2-00304-0

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

VICTOR JOHNSON and MARILYN JOHNSON,

Appellants,

v.

BILL SPENCER, BENTON COUNTY ASSESSOR,

Respondents.

BRIEF OF APPELLANTS

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I. ASSIGNMENTS OF ERROR

- 1) Did the Court error when not considering substantial compliance for the service requirement on the Board?
- 2) Did the Court error when not considering the County's role in timely catching the petitioner's failure, attempting to work together advancing the appeal and then capitalizing on the lack of service on the Board?
- 3) Did the Court error when granting the County's motion to dismiss when there was no prejudice to the County?

II. STATEMENT OF THE CASE

This case involves the petitioners, long-time farmers, seeking review of a decision by the Benton County Assessor to remove their property from classification as a farm/agricultural use to that of residential use thereby imposing significant additional taxes, interest, and penalties. CP 1. The petitioners sold a parcel of property which was previously classified as agricultural. CP 2. The petitioners claimed that RCW 84.34.070 provides for exemptions in which certain reclassifications are not considered withdrawals or removals and thus, not subject to the additional tax under RCW 84.34.108. CP 2. Namely, that the sale prompting removal of petitioner's agricultural

classification resulted from 'official action' by the county/city whereby the land use as agriculture was impractical/disallowed. Id.

For background purposes, in 1983, petitioners applied for and accepted a classification of the current use of their property as farm/agriculture under RCW 84.34.020(2). CP 3. The application for the open space exemption was approved February 3, 1983 and recorded February 4, 1983. At such time, the property was located in Benton County. Id.

In August of 1995, the City of Kennewick annexed petitioner's property. Id. Initially the property was zoned Commercial Community, later rezoned as Business Park, and in 2011 rezoned as Residential Low. CP 3. Farming continued in each use of these zoning classifications even though it was not a permitted use under any of those respective zoning classifications. Id.

In December of 2012, petitioner entered into a purchase and sale agreement to sell a portion of his property to a developer which included acreage subject to this appeal. CP 3. Upon sale, the developer did not apply for a continuance of the properties classification of open space-farm ag land use. Id. Consequently, the Benton County Assessor's office removed the property from the open space classification exemption and assessed significant penalties. Id.

The farmers/petitioners maintains that the decision making of both Benton County and the City of Kennewick to develop an Interstate 82 (I-82) corridor and interchange coupled with the City's changes in zoning, (1) prohibited the growth or expansion of farming operations, (2) guaranteed that the property surrounding petitioner's property could not be used for farming operations, and (3) that petitioner's farming activity would ultimately conflict with the uses associated with the City's zoning and force conformance thereto. CP 3.

Given the County's decision, the petitioners appealed to the Equalization Board which denied relief. CP 1. Continuing with their administrative remedies, the petitioners appealed to the Washington State Board of Tax Appeals who issued an Initial Decision on September 9, 2016 denying relief. CP 6-15. A petition for review was filed by the petitioners on September 29, 2016. CP 2. The petition was reviewed by a panel of the Washington State Board of Tax Appeals who again affirmed the County's decision on January 9, 2017 by adopting the Initial Decision as the final decision of the Board. CP 17.

The petitioners filed for judicial review pursuant to RCW 34.05.514 thereafter. CP 2. On February 8, 2017 a copy of the petition was mailed to the County Assessor, the Attorney General, and hand delivered to Reid Hay, the Benton County Deputy Prosecutor. CP 18-

19. A notice of appearance was filed by attorney Reid Hay on behalf of the Benton County Assessor (Bill Spencer) on February 22, 2107.

On April 19, 2017 attorney for petitioner's (at that time) John Ziobro of Telquist Ziobro McMillen Clare PLLC, emailed attorney Reid Hay in regards to a briefing schedule and to advise of his departure yet the firm's commitment to continue with the case. CP 205. The following day, April 20, 2017, Reid Hay proposed a briefing schedule. CP 204. Attorney John Ziobro emailed a response that attorney Andrea Clare would take over the file on May 7, 2017 and would likely "need a little time to get up to speed". CP 204. On May 19, 2017 a Notice of Substitution was filed with the court reflecting attorney Andrea Clare's representation for the petitioners. CP 23.

On May 24, 2017 Ms. Clare emailed Mr. Hay to confirm a conversation wherein Mr. Hay would send notice to the BTA (Board of Tax Appeals) and the parties would touch bases on a schedule in a few weeks. CP 207. Nevertheless, Ms. Clare's office also sent a copy of the petition and notice of substitution to the Board the following day to become the attorney of record. CP 200. In response, on May 25, 2017, the BTA acknowledged receipt of the petition and provided instructions for processing the record. CP 209. An audio CD of the hearing was sent to both attorneys of record the same day. CP 211.

Petitioner's attorney paid the costs for transcription and filed the record on July 3, 2017.

Shortly thereafter, Mr. Hay contacted Ms. Clare and indicated that the email had prompted him to review the record further and that Mr. Ziobro's inadvertent failure to timely provide the BTA a copy of the petition was grounds for dismissal. CP 201. Initially, Ms. Clare reviewed the statute and considered the appropriate "agency action" to be that of the Assessor's office for purposes of service. Id. Further, Reid Hay was always the attorney defending the Assessor's initial determination in which the subsequent entities affirmed. Id.

The County filed a motion to dismiss on August 17, 2017. CP 110. The Superior Court granted the motion and entered an Order of Dismissal with Prejudice on September 8, 2017. CP 214. The petitioner's filed a Notice of Appeal on September 26, 2017. CP 2016. This appeal is therefore timely.

III. ARGUMENT

A. The Doctrine of Substantial Compliance Applies.

Despite arguments advanced by the County, the law is not well settled against substantial compliance. In fact, the doctrine of substantial compliance has found application in the administrative procedure process on numerous occasions. It has also been rejected on numerous occasions.

For this reason, case law is difficult, if not impossible to follow accurately. The doctrine of substantial compliance has been developed over the years as an equitable remedy to forestall harsh application of strict service requirements under statute or court rules. **Union Bay Preservation Coalition v Cosmos Development & Admin. Corp.**, 127 Wn.2d 614, 622 (1995). Likewise, this policy is consistent with the often-articulated goal of Washington courts which is to permit controversies to be resolved on the merits, rather than on the basis of some arcane procedural trap. See **State v Olson**, 126 Wn.2d 315, 322-24 (1995). Our Supreme Court adopted the doctrine of substantial compliance early in the development of Washington's common law. See **Whitney v Knowlton**, 33 Wn. 319, 322 (1903).

In **Skinner v Civil Service Comm'n of the City of Medina**, 168 Wn.2d 845 (2010), the City of Medina Civil Service Commission affirmed police officer Roger Skinner's dismissal and later denied his motion for reconsideration. RCW 41.12.090 required service of a notice of appeal on the commission within 30 days. The Commission's rules supplemented the statute, providing that papers required to be filed with the Commission shall be deemed filed upon actual receipt of the papers by the Commission staff at the Commission office. **Skinner**, 168 Wn.2d at 853. Finding no commission staff present at Medina City Hall, Skinner

delivered three copies of the notice of appeal to the Medina city clerk. Our Supreme Court held that the trial court improperly dismissed the petition for improper service, reasoning that Skinner substantially complied with the service requirements by providing the notice of appeal in a manner reasonably calculated to give notice to the commissions. **Skinner**, 168 Wn.2d at 855-56.

Rejecting substantial compliance squarely conflicts with cases arising under the Washington's Industrial Insurance Act, another administrative proceeding. The process for handling court appeals of the decisions of the Board of Industrial Insurance Appeals is exactly analogous to court review of decisions of administrative agencies under the APA. See **In re Saltis**, 94 Wn.2d 889 (1980); **Vasquez v Dep't of Labor and Indus.**, 44 Wn.App. 379 (1986). In **Saltis**, a consolidated action, questions relating to service on the director of the Department of Labor and Industries were addressed. In one instance, the Department, not its director, was served and, in the other, there was no proof of service on the director. This court employed the principle of substantial compliance to hold that the appeals were properly before the courts, stating "The requirement of notice contained in RCW 51.52.110 is a practical one meant to insure that interested parties receive actual notice

of appeals of Board decisions.” **Saltis**, 94 Wn.2d at 895. The court implemented this rule as follows:

[W]e hold that proper service in this case occurred if: (1) the Director received actual notice of the appeal to the Superior Court or (2) the notice of appeal was served in a manner reasonably calculated to give notice to the Director.

Id. at 898.

Similarly in **Vasquez**, the Court of Appeals found that service on the attorney of a self-insurer as opposed to the self-insurer was sufficient to comply with the service requirements under Title 51 RCW. The Court again emphasized the question of whether the process was reasonably calculated to give notice to the appropriate parties required by the rule or the statute. **Vasquez**, 44 Wn. App at 384.

Substantial compliance has also found a path in educational personnel appeals. In **Hall v Seattle Sch. Dist. 1**, 66 Wn.App. 308 (1992), the Court of Appeals held that service of a notice of appeal on the secretary of the chair of the school board substantially complied with the statutory requirement of service on the board’s chair, a part-time unpaid position. Noting that such a chair might be unavailable for prolonged periods, the court stated:

Further “Substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of [a] statute.” **In re Santore**,

28 Wash.App. 319, 327, 623 P.2d 702, *review denied*, 95 Wash.2d 1019 (1981) (citing *Stasher v. Harger-Haldeman*, 58 Cal.2d 23, 29, 372 P.2d 649, 22 Cal.Rptr. 657 (1974)). In the cases where substantial compliance has been found, there has been actual compliance with the statute, albeit procedurally faulty. For example, in **Saltis**, a petition was delivered to the Department of Labor and Industries, not to the “director” of the Department as required by the statute. The court found that the director would in fact eventually receive the petition and therefore found that there had been substantial compliance with the statute. In other words, there was “actual compliance” with the “substance” of the statutory requirement: The director, who was required by statute to receive the petition, would receive the petition. Likewise, where service on an attorney has been deemed substantial compliance, the holding has been based on the fact that the “party” who was required under the statute to receive the petition would actually receive the petition. **Vasquez v. Department of Labor & Indus.**, 44 Wash.App. 379, 722 P.2d 854 (1986).

Here, the attorney for the petitioner’s (‘hereinafter Johnsons’) and the County’s attorney were satisfied that the appeal would proceed in Superior Court on a time line as agreed. Both attorneys worked well together and would make sure the court received the record. For years both counsel that had consistently argued their positions up through the administrative process and would finally advance those same arguments to the Benton County Superior Court. For months, both counsel assumed the matter would be resolved, finally, on the merits. However, the County later discovered a technical argument could be made and then capitalized to eliminate the Johnson’s opportunity to present their argument to the

court. Since the Johnsons substantially complied, the County's after-the-fact attempt should be rejected.

B. The Spirit of the Law had been Satisfied.

The principal objective or purpose in providing a copy of the petition to the BTA (Board of Tax Appeals) is to assure that judicial review is promptly sought and accomplished by triggering transmittal of the administrative record to the court. See **Sprint Spectrum, LP v State Dept. of Revenue**, 156 Wn.App. 949, 957 (2010); See also **Banner Realty, Inc. v Dep't of Revenue**, 48 Wn.App 274 (1987). Admittedly, there are other ways to ensure that the record of an administrative agency is submitted to the court for review. For instance, the parties may agree to make their own arrangements, as in the instant case. The Johnsons made arrangements and provided said record to the court and to the County.

Along these lines, the Johnsons' case here differs from the petitioner in **Sprint**, *infra*, since Sprint had never served the BTA. Even during the appellate process, Sprint failed to provide the petition to the BTA. In contrast, the Johnsons secured the record, ensured it was properly transcribed, and provided a copy to the County. Hence, the Johnsons should not be impacted by a technicality when it is undisputed that the spirit of the law has been fulfilled.

C. Benton County was not Prejudiced by the Oversight.

Indeed, the Johnsons' attorney arguably mis-read the statute but such oversight or mis-reading should not require dismissal of the appeal. Not serving the BTA within the 30 days has not resulted in any delay or prejudice to Benton County. The parties counsel have been working together for years on this case. In fact, the only potential prejudice will be borne by the Johnsons in the event this technical argument is rewarded.

Besides, the language of RCW 34.05.542 is confusing. Both of Johnsons' seasoned attorneys and the County initially failed to notice the 'agency' requirement equated to the Board as opposed to the Assessor until May 2017. Likewise, the statutory definitions support Johnson's initial interpretation. RCW 34.05.010 defines 'agency' as any state board, commission **department**, institution of higher education, or **officer**, authorized by law to make rules or to conduct adjudicative proceedings, except those in the legislative or judicial branches, the governor, or the **attorney general...**" (emphasis added). Thus, the Assessor, its attorney, and the AG were served based upon a reasonable interpretation of the statute. Further, the Board was served 3 months later as the parties were in the process of agreeing upon dates for briefing. In any case, neither party

has suffered due to any delay from the oversight or failure to conduct an exhaustive review of case law.

D. Service on the Office of the Attorney General was Sufficient.

In order to obtain judicial review of an agency action, a party must file a petition for review within thirty (30) days of the final order. RCW 34.05.542(1), (2). The petitioner must file the petition with the court and serve the petition on the agency, the Office of the Attorney General, and all parties of record. RCW 34.05.542(2). Service on the attorney general and parties of record may be accomplished by use of the United States mail. RCW 34.05.542(4).

However, we now know that the ‘agency’ must be served by delivery of a copy of the petition for review. Id. That requirement was softened when the legislature in 1998 amended the statute to add the provision at issue here:

For purposes of this section, service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record. RCW 34.05.542(6).

The provision was enacted by Laws of 1998, ch. 186. The final bill report summarized the purpose of the legislation: “Service on the attorney of record of any agency or party of record is sufficient to perfect jurisdiction in the superior court.” Prior to the amendment, it was

recognized that the Administrative Procedure Act, ch. 34.05 RCW, had been designed “to break with prior practice” and “therefore eliminated many of the formalities associated with the initiation of an action in superior court.” **Diehl v. W. Wash. Growth Mgmt. Hr'gs Bd.**, 153 Wash.2d 207, 215, 103 P.3d 193 (2004). Neither the BTA nor the AG have any stake or interest in the outcome. Yet both are referenced in the statute to receive notice. The BTA is an entity created, designed, and maintained by Washington State. As a branch of government in our state, notice to the AG, as attorney for a state department should be acknowledged. Regardless, since all parties actively involved and participating in this appeal are and have been well aware of the Petition, service on the AG should be considered substantial compliant and sufficient for the BTA.

E. Equitable Estoppel is Appropriate Under the Circumstances.

Given the County’s complete acquiescence, equitable estoppel should apply. Equitable estoppel requires an act inconsistent with a later asserted defense and reasonable reliance upon that act by the other party. **Lybbert v Grant County**, 141 Wn.2d 29, 35 (2000). The parties here were making the necessary arrangements to advance an appeal in one, single hearing upon the merits. The County’s failure to raise the service issue initially caused Johnsons to advance unnecessary costs and fees.

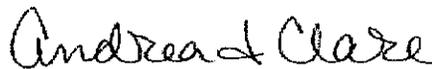
Nevertheless, when the requirements for equitable estoppel have not been met, the court may still consider whether a party waived a defense by raising it too late. **Lybbert**, 141 Wn.2d at 38-39. Johnsons simply request their day in court. The County appeared through the very same attorney that had acted on its behalf for years on this matter. While no answer was required, the County failed to provide any affirmative defense or indication of an issue for nearly 6 months. Instead, the County acted in good faith, cooperatively with counsel, until months later when it found a moment to capitalize. Equitable estoppel should apply to prevent the County seizing an opportunity and allowing the matter to progress to a hearing on the merits.

IV. CONCLUSION

Based upon the foregoing reasons, the Johnsons respectfully request the court Vacate the Order of Dismissal and Remand for a hearing.

RESPECTFULLY SUBMITTED, this 8th day of January, 2018.

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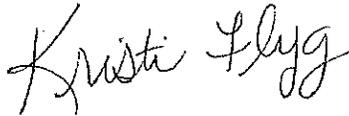
CERTIFICATE OF SERVICE

On the 8th day of January, 2018, I caused to be served a true and correct copy of the within document described as BRIEF OF APPELLANTS to be served on all interested parties to this action as follows:

Reid Hay Deputy Prosecuting Attorney 7122 W. Okanogan Place, Bldg. A Kennewick, WA 99336	Via United States Mail <input type="checkbox"/> Via Legal Messenger Service <input checked="" type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Electronic Mail <input checked="" type="checkbox"/>
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Dated this 8th day of January, 2018.

TELQUIST McMILLEN CLARE, PLLC



KRISTI FLYG, *Legal Assistant*

TELQUIST MCMILLEN CLARE, PLLC

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